No. 17-__

IN THE

Supreme Court of the United States

AIR AND LIQUID SYSTEMS CORP., CBS CORPORATION, AND FOSTER WHEELER LLC,

Petitioners-Defendants,

v.

ROBERTA G. DEVRIES, Administratrix of the Estate of John B. Devries, Deceased, and Widow in her own right,

Respondent.

INGERSOLL RAND COMPANY,

Petitioner-Defendant,

v.

SHIRLEY MCAFEE, Executrix of the Estate of Kenneth McAfee, and Widow in her own right,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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(continued from front cover)

QUESTION PRESENTED

Can products-liability defendants be held liable under maritime law for injuries caused by products that they did not make, sell, or distribute?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The respondents, who were the plaintiffs-appellants below, are:

1. Roberta Devries, in her individual capacity and in her capacity as administratrix of the estate of John B. DeVries, and

2. Shirley McAfee, Executrix of the Estate of Kenneth McAfee, Deceased, and Widow in her own right.

The petitioners, all of whom were defendants-appellees below, are:

1. Air & Liquid Systems Corp. is a wholly owned subsidiary of Ampco-Pittsburgh Corporation, a publicly traded corporation. It is the successor-by-merger to Buffalo Pumps, Inc.

2. CBS Corporation is a publicly traded company. National Amusements, Inc. and its wholly owned subsidiary, NAI Entertainment Holdings LLC, are privately held companies, which, in the aggregate, own the majority of the voting stock of CBS Corporation. To CBS Corporation's knowledge, no publicly held corporation owns 10% or more of the voting stock of CBS Corporation.

3. Foster Wheeler LLC is a wholly-owned indirect subsidiary of John Wood Group plc (Scotland), a publicly traded company. No known person or entity currently owns 10% or more of John Wood Group plc's (Scotland) publicly traded common stock.

4. The parent company for Ingersoll Rand Company is Ingersoll Rand PLC, a publicly traded corporation. No other publicly traded corporation owns more than 10 percent of Ingersoll Rand Company stock.

Along with the petitioners, the following parties were listed as either defendants or defendants-appellees on the Third Circuit's docket below. None of the following parties are petitioners in this Court:

1. 20th Century Gove Corp. of Texas
2. Allen Bradley Co.
3. Allen Sherman Hoff
4. American Optical
5. American Optical Corp.
6. AMTICO Division of American Biltrite
7. Aurora Pumps
8. AZRock Industries, Inc.
9. AO SmithCorp.
10. BF Goodrich Co.
11. Baltimore Ennis Land Co. Inc.
12. Bayer Cropscience Inc.
13. Borg Warner Corp.
14. Burnham LLC
15. BW/IP Inc.
16. Carrier Corp.
17. Certain Teed Corp.
18. Cleaver Brooks Inc.
19. Crane Co.

20. Crown Cork & Seal Co., Inc.
21. Federal Mogul Asbestos Personal Injury Trust
22. Gallagher Fluid Seals, Inc.
23. General Electric Co.
24. Goodyear Tire & Rubber Co.
25. Goulds Pumps, Inc.
26. Hajoca Corp.
27. Hampshire Industries, Inc.
28. IMO Industries, Inc.
29. J.A. Sexauer
30. J.H. France Refractories Co.
31. John Crane, Inc.
32. Metropolitan Life Insurance Co.
33. Minnesota Mining & Manufacturing Co.
34. McCord Gasket Co.
35. NOSROC Corporation
36. Oakfabco, Inc.
37. Owens-Illinois, Inc.
38. Parker Hannifin Corp.
39. Pecora Corp.
40. Peerless Industries, Inc.
41. Riley Stoker Corp.
42. Selby Battersby & Co.
43. Sid Harvey Mid Atlantic, Inc.
44. Therman Engineering, Inc.
45. Trane U.S. Inc.

46. Warren Pumps, LLC
47. Weil McClain Division of the Marley Co.

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PETITION FOR A WRIT OF CERTIORARI

This petition asks the Court to resolve an acknowledged circuit split on an important issue of federal law: In maritime-law cases, can a products-liability defendant be held liable for injuries allegedly caused by components that are manufactured, sold, and distributed by third parties, and that are added to the defendant's products post-sale? In the Sixth Circuit, the answer is "no." That answer follows from the principle that tort-law defendants are liable for only the injuries that they cause—they bear no responsibility for injuries that *others* cause. Without even mentioning this foundational tort-law principle, the Third Circuit expressly parted ways with the Sixth Circuit, and held that a defendant may be held liable for injuries caused by the products of a third party. This Court should grant certiorari to restore uniformity to maritime law, and to clarify that maritime-law defendants are not liable for injuries that they do not cause.

OPINIONS BELOW

1. ***Air & Liquid Systems Corp., et al, v. DeVries.*** The United States District Court for the Eastern District of Pennsylvania initially awarded summary judgment to the petitioners in a series of unpublished orders, all of which are available on Westlaw at 2014 WL 6746811 (ordering summary judgment for Foster Wheeler LLC), Pet. App. 71a; 2014 WL 6746795 (ordering summary judgment for CBS Corporation), Pet. App. 63a; 2014 WL 6746960 (ordering summary judgment for Buffalo Pumps, Inc.), Pet. App. 79a.

The United States Court of Appeals for the Third Circuit remanded in an unpublished order. Pet. App. 48a. On remand, the District Court again awarded summary judgment, and issued an opinion published at 188 F. Supp. 3d 454. Pet. App. 20a. The Third Circuit reversed, in an opinion published in the Federal Reporter at 873 F.3d 232. Pet. App. 1a.

2. ***Ingersoll Rand Co. v. McAfee.*** The United States District Court for the Eastern District of Pennsylvania awarded summary judgment to Ingersoll Rand in an unpublished order available on Westlaw at 2014 WL 12601085, Pet. App. 55a.

The Third Circuit remanded in an unpublished order. Pet. App. 43a. On remand, the District Court again awarded summary judgment, again in an unpublished order. Pet. App. 18a. On appeal, the Third Circuit consolidated the case with the *DeVries* matter; the opinion in the consolidated cases is published in the Federal Reporter at 873 F.3d 232. Pet. App. 1a.

JURISDICTION

John and Roberta DeVries sued nearly 50 entities in Pennsylvania state court. So too did Kenneth and Shirley McAfee, in a separate action. Both cases were removed to the United States District Court for the Eastern District of Pennsylvania. That court had jurisdiction pursuant to 28 U.S.C. §§ 1333(1) and 1442(a)(1), because both cases arose from injuries that allegedly occurred aboard vessels on navigable waters, and because several defendants stated a colorable federal common-law defense to claims arising from their conduct as contractors for the United States Navy.

After the District Court awarded summary judgment to the petitioners in both cases, Roberta Devries (in her individual capacity, and as administratrix of John's estate) and Shirley McAfee (in her individual capacity, and as executrix of Kenneth's estate) appealed to the Third Circuit. That court had jurisdiction under 28 U.S.C. § 1291. It consolidated the cases in a single appeal, and issued its decision on October 3, 2017. The petitioners moved this Court for an extension of time in which to file their petition for certiorari. *See Air and Liquid Systems Corp., et al. v. DeVries, et al.*, No. 17A625. Justice Alito granted that application, giving the petitioners until January 31, 2018, to file. They have timely filed, and this Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

The Third Circuit issued its opinion below in a consolidated appeal that began as two separate matters: *DeVries v. General Electric Co., et al.*, No. 13-cv-474 (E.D. Pa.), and *McAfee v. 20th Century Glove Corp. of Texas, et al.*, No. 13-cv-6856 (E.D. Pa.). This brief describes these matters separately, before turning to the Third Circuit's decision in the consolidated appeal.

A. The *DeVries* Matter

Sixty years ago, between 1957 and 1960, John B. DeVries served in the Navy aboard the *U.S.S. Turner*. He worked as an engineer. *See* Appendix 88 *DeVries v. Buffalo Pumps*, No. 15-1278 (3d Cir.)

("DJA"). At first, his responsibilities included overseeing work in the *Turner*'s engine and fire rooms, where he did not perform "actual hands-on work with mechanical equipment." DJA 619. Eventually, the Navy promoted him to head of the Engineering Department. DJA 618–19. His official duties in that role were "limited to supervision," but he occasionally "had to show people how to" work on equipment. DJA 619. Some of that equipment was insulated with asbestos, and some of it contained internal components (like gaskets and packing) made with asbestos. According to John DeVries, his work with this equipment exposed him to asbestos dust.

In 2012, doctors diagnosed him with lung cancer, allegedly caused by asbestos exposure. He and his wife, Roberta, sued nearly 50 entities that they claimed were responsible for his injuries, seeking relief under theories of negligence and strict liability. These entities included the *DeVries* petitioners—CBS Corporation, Foster Wheeler LLC, and Buffalo Pumps (predecessor in interest to petitioner Air & Liquid Systems Corp.)—all of which manufactured and supplied equipment that the Navy used aboard the *Turner* during John DeVries's service. None of these petitioners, however, manufactured or supplied any of the asbestos-containing insulation, gaskets, or packing alleged to have caused his injuries. Thus, the litigation to date has focused largely on whether defendants in maritime cases can be held liable for injuries caused by third-party components that they neither manufactured, distributed, nor sold.

1. Bath Iron Works built the *Turner* in 1945. DJA 619. The *DeVries* petitioners supplied one or more of the durable parts installed on board the ship: West-

inghouse Electric Corporation (the predecessor-in-interest to petitioner CBS) supplied the Navy with the *Turner*'s generators, blowers, and turbines. *See* DJA 558–59, 605, 607. Foster Wheeler supplied economizers for use inside Babcock & Wilcox boilers. DJA 1151–53. And the ship's pumps came from (among others) Buffalo Pumps. *See* DJA 327, 352–53, 357–63.

At the time, the Navy required equipment suppliers, including the petitioners, to conform their equipment to precise Navy specifications. *See, e.g.*, DJA 485, 487, 494, 940; 1475–76. One such requirement is particularly relevant to this case: Contractors had to supply equipment—including turbines and pumps—in "bare metal" form. That is, contractors had to supply the equipment free of exterior insulation. *See* DJA 490.

As a result of this requirement, the petitioners had no control over the materials the Navy would use to insulate their equipment post-sale. That decision was left to the Navy alone, which decided to insulate the equipment on board the *Turner* with asbestos. It made this decision based on its determination that asbestos "best met the Navy's military requirements" at the time, including "optimum heat retention, low weight, fire resistance, resistance to water damage and insect infestation, and cost-efficiency." DJA 491. And the Navy made this decision notwithstanding the dangers that asbestos posed—dangers that the Navy knew of *decades* earlier, by 1922. *See* DJA 521–29.

The Navy used asbestos for more than insulation. For example, it required asbestos-containing internal components (like consumable gaskets and packing

used to form seals between metal components) in certain equipment. *See, e.g.*, DJA 491, 494, 1540. These asbestos-containing internal components, unlike the insulation, ***could be*** included with equipment supplied to the Navy. But such internal components wore out and needed to be replaced many times over during a ship's multi-decade lifespan. It is thus uncontested that any asbestos-containing components supplied with the petitioners' equipment had worn out and been replaced "numerous times" before John DeVries began his service in 1957. DJA 1465, 1505.

What is more, none of the petitioners manufactured the replacement parts used aboard the *Turner*, supplied such parts, or did anything else to facilitate their installation. Instead, companies other than the petitioners made and sold the asbestos and asbestos-containing products to which John DeVries was allegedly exposed during his Navy service. And the Navy chose to continue requiring asbestos insulation and asbestos-containing replacement parts into the late 1970s, *see* DJA 492—three decades after petitioners supplied their equipment for use aboard the *Turner*, and at least two decades after the Navy became aware that some non-asbestos thermal insulation was "suitable for use on steam turbines and other machinery," Supplemental Appendix 87 *DeVries*, No. 15-1278.

2. In June 2012, more than 50 years after his service aboard the *Turner*, doctors diagnosed John DeVries with lung cancer. DJA 97. Later that year, he and his wife, Roberta, filed suit against the petitioners and numerous other entities in the Philadelphia Court of Common Pleas. DJA 87. Their complaint alleged that John DeVries had been exposed to

asbestos at every site where he worked during his 55-year career—a career that included, in addition to 3 years of Navy service, 32 years as an engineer for Rohm & Hass, and 20 more as a part-time engineering consultant. The complaint further alleged that this asbestos exposure caused John DeVries's cancer. DJA 87–98. The complaint sought to hold petitioners liable under products-liability theories of strict liability and negligence. Pet. App. 4a.

After CBS removed the case to federal court, DJA 102–17, the DeVrieses voluntarily dismissed their claims against some defendants. The District Court dismissed the vast majority of other defendants, whose summary-judgment motions the DeVrieses chose not to oppose. This left only those defendants, like the *DeVries* petitioners, that had supplied equipment for the *Turner* during its construction, but that *did not* make, distribute, sell, or otherwise supply the asbestos and asbestos-containing parts alleged to have caused John DeVries's injuries.

Each of the *DeVries* petitioners moved for summary judgment under what some courts have called the "bare-metal rule." Under that rule, companies that manufacture and sell equipment are not liable for injuries caused by third-party asbestos added to their equipment after it leaves their control. The rule is sometimes called the "bare-metal defense." That, however, is a misnomer: The bare-metal rule is not an affirmative defense, but rather an application of the principle that plaintiffs must prove causation in order to succeed on a tort claim.

The District Court granted the petitioners' motions. As an initial matter, it held that the claims against the petitioners were governed by maritime

law, since each sought relief for injuries allegedly caused by shipboard exposure to asbestos. Pet. App. 66a, 74a, 81a. And maritime law, the court held, recognizes the bare-metal rule. Pet. App. 67a, 74a, 82a. In reaching this conclusion, the District Court relied on its earlier decision in *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012). *Conner* reasoned that the bare-metal rule is but a specific application of the basic tort-law principle that defendants are not liable for injuries caused by third parties' products—a principle that maritime law incorporates. *See id.* Since there was no evidence that any of the petitioners manufactured, sold, or otherwise had any involvement with the distribution of the asbestos alleged to have contributed to John DeVries's cancer, the District Court awarded summary judgment to each. Pet. App. 69a–70a, 77a–78a, 85a–87a.

3. John DeVries died from lung cancer before the District Court entered summary judgment. But Roberta DeVries—acting on her own behalf and now on behalf of John DeVries's estate—appealed to the Third Circuit. Her brief argued that the bare-metal rule does not apply in maritime law. According to her, plaintiffs in asbestos suits arising under the federal courts' admiralty jurisdiction need not prove that the defendant's product caused plaintiff's harm; instead, defendants can be held liable so long as it was foreseeable that their product would be used in conjunction with the alleged injury-causing product. Because the District Court held otherwise, she argued that the Third Circuit should reverse it.

Rather than address the bare-metal rule's applicability in maritime law, the Third Circuit remanded

the case so that the District Court could clarify the scope of its ruling. The Third Circuit said that it could not "determine whether the District Court considered the negligence claim." Pet. App. 45a. It asked the District Court to expressly address the bare-metal rule's application to negligence claims.

On remand, the District Court confirmed that it had previously considered the negligence claims before awarding the petitioners summary judgment. Pet. App. 22a. Emphasizing the importance of uniformity and predictability in maritime law, the District Court explained that maritime law does not impose liability for harms caused by third parties' products. Pet. App 29a. A plaintiff accordingly cannot prevail without establishing that a defendant manufactured or supplied the product that caused his injuries. Pet. App 29a–30a. This rule applies equally to strict liability and negligence claims. Pet. App 33a–34a. The District Court accordingly reaffirmed summary judgment for Defendants on all claims. Pet. App 22a, 42a. Roberta DeVries again appealed to the Third Circuit.

B. The *McAfee* Matter.

Kenneth McAfee served aboard the *U.S.S. Wanamassa* in the late 1970s. In the early-to-mid 1980s, he served aboard the *U.S.S. Commodore*. *See* Joint Appendix 68, 107, *McAfee v. Ingersoll Rand Company*, No. 15-2667 (3d Cir.) ("MJA"). Ingersoll manufactured and supplied compressors that the Navy used on those ships during McAfee's service. The Navy required Ingersoll to conform the equipment it manufactured to the Navy's precise specifications. *Supra* 5. Specifically, the Navy required Ingersoll to use certain asbestos-containing parts (for

example, gaskets and packing) with its compressors. But to the extent any such parts were originally supplied with Ingersoll's equipment, they had worn out, and been replaced by the Navy many times before McAfee began serving on the *Wanamassa* and the *Commodore*. *See* Appellants Br. 9, 22, 29, *McAfee v. Ingersoll Rand Co.*, No. 15-2667. Ingersoll did not manufacture, supply, or play any other role in replacing the asbestos-containing parts that allegedly injured McAfee. *See* Pet. App. 4a. Indeed, Kenneth McAfee admitted that he did not know who made any of the asbestos-containing gaskets or packing that he handled on the *Wanamassa* or the *Commodore*. *See* MJA 77–79.

McAfee and his wife sued nearly 50 entities, including Ingersoll Rand, for injuries allegedly caused by asbestos exposure aboard the *Wanamassa* and the *Commodore*. The District Court granted summary judgment to Ingersoll, after determining that Ingersoll did not manufacture or supply the insulation, gaskets, or packing that the Navy used with Ingersoll's compressors. *See* Pet. App. 61a–62a.

As it did in *DeVries*, the Third Circuit summarily remanded the case with the instructions to clarify the bare-metal rule's application to negligence claims. *See* Pet. App. 47a. And the District Court, as it did in *DeVries*, reaffirmed its earlier judgment. *See* Pet. App. 18a–19a. Shirley McAfee appealed on her own behalf, and on behalf of her now-deceased husband's estate.

C. The Third Circuit's consolidated resolution of the *DeVries* and *McAfee* appeals

The Third Circuit consolidated the second *McAfee* and *DeVries* appeals. For a second time, it remanded both matters. This time, however, it addressed whether and how the bare-metal rule applies in maritime-law cases.

The court framed the appeal as presenting the following question: "When, if ever, should a manufacturer of a product that does not contain asbestos be held liable for an asbestos-related injury most directly caused by parts added on to the manufacturer's product?" Pet. App. 5a. It held that manufacturers can be held liable for injuries caused by third-party asbestos—at least in negligence cases—when those injuries are reasonably foreseeable consequences of the manufacturer's own conduct. Pet. App. 15a–16a. Whether a particular injury *is* the reasonably foreseeable consequence of a manufacturer's conduct will be a fact-specific inquiry, guided by five non-exhaustive factors.

The Third Circuit's holding grew out of its view that the question whether manufacturers should be held liable for injuries caused by others' asbestos is really all about foreseeability. In the Court's words: "When parties debate the bare-metal defense, they debate when and whether a manufacturer could reasonably foresee that its actions or omissions would cause the plaintiff's asbestos-related injury." Pet. App. 7a. The Court cited nothing in support of this assertion. Indeed, its opinion altogether ignored the black-letter tort-law principle that defendants are liable only for injuries they cause—a principle that

the petitioners argued required affirmance, since Roberta DeVries and Shirley McAfee sought to hold petitioners liable for injuries allegedly caused by asbestos and asbestos-containing products made, distributed, and sold by other companies.

After "rooting the bare-metal defense in foreseeability," the court characterized the issue before it as involving a choice between two options. On the one hand, it could adopt a bright-line rule, under which injuries caused by third parties' asbestos are never reasonably foreseeable. On the other, it could adopt a totality-of-the-circumstances test for evaluating foreseeability.

The Third Circuit acknowledged that the Sixth Circuit had already addressed the question before it in *Lindstrom v. A-C Products Liability Trust*, 424 F.3d 488 (6th Cir. 2005). There, the Sixth Circuit adopted what the Third Circuit characterized as the "bright-line rule, holding that a manufacturer of a bare-metal product is never liable for injuries caused by later-added asbestos-containing materials." Pet. App. 5a. But the Third Circuit parted ways with its sister circuit, adopting the totality-of-the-circumstances approach. It held that a "manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's" conduct. Pet. App. 15a. "[F]or example," the court explained, "a bare-metal manufacturer may be subject to liability if it reasonably could have known, at the time it placed its product into the stream of commerce, that":

(1) asbestos is hazardous, and

(2) its product will be used with an asbestos containing part, because

(a) the product was originally equipped with an asbestos containing part that could reasonably be expected to be replaced over the product's lifetime,

(b) the manufacturer specifically directed that the product be used with an asbestos-containing part, or

(c) the product required an asbestos-containing part to function properly.

Pet. App. 15a–16a.

The court stressed, however, that these "may *or may not be* the only facts on which liability can arise," and noted that the "finer contours of the" bare-metal rule "must be decided on a case-by-case basis." Pet. App. 16a (emphasis added).

The Third Circuit adopted this totality-of-the-circumstances approach because it believed it would do better than the bright-line rule at promoting maritime law's "deep[] concern" for "the protection of sailors." Specifically, the totality-of-the-circumstances approach would permit "a greater number of deserving sailors to receive compensation." Pet. App. 13a. The court acknowledged that maritime law is additionally concerned with "traditions of simplicity and practicality," Pet. App. 13a (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959)); that it "seeks out 'uniform rules to govern conduct and liability,'" Pet. App. 14a (quoting *Foremost Ins. Co. v Richardson*,

457 U.S. 668, 674–75 (1982)); and that its "fundamental interest" is "the protection of maritime commerce," *id.*(quoting *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)). But it concluded that each of these purposes was equally consistent with the bright-line rule it rejected and the totality-of-the-circumstances test it adopted. Pet. App. 13a–15a.

This petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

The question presented involves an acknowledged circuit split—one exacerbated by contradictory decisions from federal district courts and state courts. That is reason enough to grant a petition for certiorari in *any* case involving federal law. But it is a particularly strong reason to grant a petition arising under this Court's admiralty jurisdiction, which exists to ensure uniformity in maritime law. On top of all that, the decision below is wrong, and will cause confusion in the context of maritime-law products-liability suits.

I. THE CIRCUITS ARE SPLIT REGARDING THE ANSWER TO THE QUESTION PRESENTED

In *Lindstrom v. A-C Product Liability Trust*, 424 F.3d 488, the Sixth Circuit held that maritime-law defendants cannot be held liable for injuries caused by exposure to asbestos from later-added insulation and asbestos-containing parts that third parties manufacture, distribute, and sell. *Id.* at 492–95. The Third Circuit expressly rejected that rule in favor of its totality-of-the-circumstances foreseeability test, and thus expressly created a circuit split. Pet.

App. 10a, 14a. The Third and Sixth Circuits are now in direct conflict.

The approaches that the Third and Sixth Circuits took to answering the question presented are as inconsistent as the answers they reached. *Lindstrom* grounded its holding on the principle that tort-law plaintiffs "must establish causation." 424 F.3d at 492. As the Sixth Circuit explained in an earlier case addressing the same issue, "in order to maintain an action for either negligence or strict liability under maritime law, a plaintiff must show causation of his injury by either the defendant's negligence or the product defect." *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 375 (6th Cir. 2001). In asbestos cases, this means establishing that the *defendant* made, supplied, or otherwise assisted in providing the injury-causing asbestos. *Lindstrom*, 424 F.3d at 495–96. Thus, a defendant "cannot be held responsible for material 'attached or connected' to its product" post-sale. *Id.* at 495 (quoting *Stark*, 21 F. App'x at 381). This approach stands in marked contrast to that taken by the Third Circuit, which described the bare-metal rule as turning entirely on the concept of foreseeability, considering the totality of the circumstances. Pet. App. 7a–8a.

Rulings from federal district courts around the country have further clouded the issue. Some have sided with *Lindstrom*. *See, e.g.*, *Nelson v. Air & Liquid Sys. Corp.*, 2014 WL 6982476, at *12–*13 (W.D. Wash. Dec. 9, 2014); *Cabasug v. Crane Co.*, 989 F. Supp. 2d 1027, 1039 (D. Haw. 2013). Others have adopted something similar to the foreseeability test embraced below. One court, for example, has held that plaintiffs may bring failure-to-warn claims

against manufacturers based on later-added asbestos if the breach of the duty to warn "regarding the *original* asbestos components that the manufacturer added to the product is *a* proximate cause of a subsequent harmful exposure to asbestos contained in an aftermarket replacement part." *See Bell v. Foster Wheeler Energy Corp.*, 2016 WL 5780104, at *6 (E.D. La. Oct. 4, 2016) (emphasis added). Other courts hold that manufacturers can be held liable, at least in failure-to-warn cases, if the future use of asbestos is in some sense "inevitable." *See Chesher v. 3M Co.*, 234 F. Supp. 3d 693, 713 (D.S.C. 2017); *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 769 (N.D. Ill. 2014).

There is further division even within these camps. For example, the "inevitability" courts do not agree on what the test requires. Some posit a three-part test, under which manufacturers can be held liable if:

(1) "the defendant manufactured a product that, by necessity, contained asbestos components";

(2) "the asbestos containing material was essential to the proper functioning of the defendant's product"; and

(3) "the asbestos-containing material would necessarily be replaced by other asbestos-containing material, whether supplied by the original manufacturer or someone else."

Quirin, 17 F. Supp. 3d at 769–70; *accord Osterhout v. Crane Co.*, No. 2016 U.S. Dist. LEXIS 39890, at *34 (N.D.N.Y. Mar. 21, 2016); *McAlvey v. Atlas Copco Compressors, L.L.C.*, 2015 WL 5118138, at *2 (S.D.

Ill. Aug. 28, 2015). Others modify this test slightly, so that failure-to-warn plaintiffs must show:

(1) that "the defendant actually incorporated asbestos-containing components into its original product," and *either*

(2) (a) "the defendant 'specified' the use of asbestos-containing replacement components," *or*

(b) "such components were 'essential to the proper functioning' of the defendant's product."

Chesher, 234 F. Supp. 3d at 714 (internal quotation marks and citations omitted).

Further complicating matters, state courts disagree about the bare-metal rule's applicability in cases arising under state law. Some have adopted the *Lindstrom* test. *See, e.g.*, *Grant v. Foster Wheeler, LLC*, 140 A.3d 1242, 1248–49 (Maine 2016); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 502 (Wash. 2008). Others have adopted some version of a foreseeability-based approach. *See, e.g.*, *In re New York City Asbestos Litig.*, 59 N.E.3d 458, 475 (N.Y. 2016); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 994 (Md. 2015).

While states are free to design their tort law however they wish, this divergence causes problems for federal courts applying maritime law, because federal courts "draw guidance from" state law when formulating maritime-law principles. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 839 (1996). With the states divided as to the rule's application, federal courts cannot look to state law for consistent guidance regarding how (and whether) the bare-metal rule ought to apply in the maritime context. As such,

the lower courts' chances of resolving the confusion without this Court's help are even slimmer than they would be in the context of a typical circuit split.

II. THE DIVISION IN THE LOWER COURTS UNDERMINES MARITIME LAW'S STRONG INTEREST IN UNIFORMITY

"The judicial Power" extends to "all cases of admiralty and maritime Jurisdiction." U.S. Const., Art. III, §2. This jurisdictional grant ensures "[t]he advantages resulting to the commerce and navigation of the United States ... from a uniformity of rules and decisions in all maritime questions." *DeLovio v. Boit*, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (Story, J., riding circuit). To this day, maritime courts' primary goals include assuring that "*all* operators of vessels on navigable waters are subject to uniform rules of conduct." *Foremost Ins.*, 457 U.S. at 675. Those uniform rules should adhere to the maximum extent possible to admiralty law's "traditions of simplicity and practicality." *Kermarec*, 358 U.S. at 631.

When it comes to the bare-metal rule, admiralty-law defendants are *not* "subject to uniform rules of conduct." The Third and Sixth Circuits have adopted squarely contrary approaches to the question whether manufacturers are liable for injuries caused by asbestos made and sold by third parties. This means that sailors, ship operators, and maritime manufacturing companies are subject to different rules depending on where on the Ohio River (Pittsburgh or Cincinnati) or the Great Lakes (Toledo or Erie) a barge happens to be. "The conflict between the approaches to this question taken by the Courts of Appeals is reason enough to grant this petition, for uniformity and predictability in the maritime industry

were the ends sought in the Constitution when federal-court maritime jurisdiction was created in the first instance." *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 470 U.S. 1031, 1034 (1985) (Brennan, J., dissenting from denial of certiorari).

The divergent approaches taken by federal district courts and state courts show that the confusion is spreading, not subsiding. This Court's intervention, therefore, is the only realistic option for restoring uniformity as to the question presented. Until the Court intervenes, sailors and potential defendants will be hard-pressed to make even an educated guess regarding the applicable law outside the Third and Sixth Circuits. They will, in other words, be deprived of the chance to "look ahead with some ability to know what the stakes are in choosing one course of action or another." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008). Permitting that confusion to stand "would be foreign to" admiralty law's "traditions of simplicity and practicality." *Kermarec*, 358 U.S. at 631. And it would run contrary to the principle that the rules of maritime law ought not be "too indeterminate to enable manufacturers easily to structure their business behavior." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 870 (1986).

It is especially important to establish clear, uniform rules for adjudicating the liability of actions taken pursuant to military contracts. Needless to say, the federal government has a significant interest in procuring the equipment it needs to defend the country. And "[i]t is plain that the Federal Government's interest in the procurement of equipment is

implicated by suits such as the present one—even though the dispute is one between private parties." *Boyle v. United Techs. Corp.*, 487 U.S. 500, 506 (1988). Again, the Navy contracted with each of the petitioners to provide equipment for use on board ships, and *mandated* that this equipment use asbestos insulation and asbestos-containing parts. *Supra* 5–6. Thus, Roberta DeVries and Shirley McAfee seek to hold the petitioners liable for actions they took in performance of military-procurement contracts. Assuming petitioners can be held liable for such conduct at all, the standards by which their liability is to be judged must be uniform. After all, contractors (and prospective contractors) cannot rationally predict their risk if they do not know the rules according to which their liability will be determined. And when risk is difficult to gauge, businesses will insure against it either by imposing higher prices or by leaving the market altogether. Both possibilities undermine the government's interest in obtaining military equipment.

These risks are magnified in the Navy context: "On a ship most things are connected to other things." *Stark*, 21 F. App'x at 381. As a result, most anything that goes on a ship works with or is incorporated into numerous other components and systems. *Id.* Permitting the imposition of liability based on foreseeable interactions between products thus exponentially increases the potential liability—particularly since ships are built to last for decades, with their various components interacting all the while.

III. THE THIRD CIRCUIT ERRED IN ADOPTING A FORESEEABILITY TEST

Finally, the Court should grant certiorari because this is the perfect vehicle for reversing the foreseeability approach that the Third Circuit wrongly adopted below.

A. Maritime law does not recognize products-liability theories under which defendants can be liable for injuries caused by third parties' products

The judiciary develops the substantive rules of admiralty law "in the manner of a common law court." *Exxon Shipping*, 554 U.S. at 489–90. When fashioning a national admiralty rule, courts look to traditional common-law principles. *See, e.g.*, *id.* at 490–515. They judge the wisdom of adopting these principles with reference to admiralty law's underlying objectives—for example, its interest in advancing maritime commerce, ensuring predictability, and promoting uniformity. *See, e.g.*, *Kermarec*, 358 U.S. at 630–31 (rejecting common-law distinction between licensees and invitees, which "would be foreign to [maritime law's] traditions of simplicity and practicality").

1. At common law, defendants are liable only for the injuries they cause. *See* Restatement (Second) of Torts §§ 4, 315 (1965). They have neither a duty to control third parties, nor a duty to rescue potential plaintiffs from injuries caused by third-party acts. *See id.* §§ 314, 315.

As applied to products-liability law, this means that defendants are liable only for injuries caused by products that they either manufactured or sold. Re-

gardless of whether liability is predicated upon negligence or strict liability, the law penalizes only those parties who placed the harmful product "into the stream of commerce"—that is, those who manufactured, distributed, or sold the defective product. *See id.* § 402A (strict liability only for "[o]ne who sells" product); *id.* § 388 ("[o]ne who supplies directly or through a third person a chattel" is liable in negligence for harms "caused by the use of the chattel"). This makes sense: A defendant cannot be said to have "caused" an injury by making and selling something other than the product that inflicted the injury. *See, e.g., In re Darvocet, Darvon, & Propoxyphene Prod. Liab. Litig.*, 756 F.3d 917, 939 (6th Cir. 2014) (concluding, under the law of 22 different states, that branded-drug manufacturers cannot be held liable under failure-to-warn theories in suits brought by generic-drug consumers).

Products-liability law does not impose liability on defendants for injuries caused by the use of other parties' products *even when* the products will be used in combination. A manufacturer generally has no duty of care with respect to another's products. *See, e.g.*, Restatement (Third) of Torts: Prod. Liab. § 5 cmt. a (1998); 63A Am. Jur. 2d Prods. Liab. § 1027. That is why courts have held makers of dialysis machines have no "duty to warn of the hazards" associated with dialysis-machine cleaning agents "manufactured by someone else." *Brown v. Drake-Willock Int'l, Ltd.*, 530 N.W.2d 510, 515 (Mich. Ct. App. 1995). It is why automakers cannot be held liable for defects in replacement wheels added to their cars post-sale. *See Baughman v. Gen. Motors Corp.*, 780 F.2d 1131, 1133 (4th Cir. 1986). It explains the rule

that manufacturers of non-defective component parts of an integrated product cannot be held liable "for injury that results from a defect in the integrated product." *Cipollone v. Yale Indus. Prod., Inc.*, 202 F.3d 376, 379 (1st Cir. 2000); *accord Hidalgo v. Fagen, Inc.*, 206 F.3d 1013, 1017 (10th Cir. 2000). And it justifies *Lindstrom*'s view that equipment manufacturers cannot be held liable for injuries caused by third parties' asbestos added to their equipment years after its sale. *See Lindstrom*, 424 F.3d at 495–96; *see also, e.g.*, *Grant*, 140 A.3d at 1248; *Braaten*, 198 P.3d at 498, 500–01, 504.

The foregoing applies "[r]egardless of the theory which liability is predicated upon." 51 A.L.R.3d 1344 § 2[a]. Because the bare-metal rule is premised on the principle that a defendant has no duty of care concerning another entity's products, the rule bars claims sounding in negligence. *See, e.g.*, *Braaten*, 198 P.3d at 501; *Conner*, 842 F. Supp. 2d at 801; *see also, e.g.*, *Walton v. Harnischfeger*, 796 S.W.2d 225, 228 (Tex. App. 1990) ("the absence of a duty" to warn about a third party's products "compels a summary judgment for [a manufacturer] based upon its 'no-duty' ground"). And it applies equally to suits predicated on manufacturing-defect, design-defect, and failure-to-warn theories. *See, e.g.*, *Lindstrom*, 424 F.3d at 495 (in manufacturing-defect case, rejecting liability where "asbestos that [plaintiff] may have been exposed to in connection with [defendant's] product [was] attributable to some other manufacturer"); *Sanders v. Ingram Equip., Inc.*, 531 So. 2d 879, 880 (Ala. 1988) (in design-defect case, "a distributor or manufacturer of a nondefective [product] is not liable for defects in a product that it did not

manufacture, sell, or otherwise place in the stream of commerce"); *Braaten*, 198 P.3d at 498 (describing "majority rule" as a "'manufacturer's duty to warn is restricted to warnings based on the characteristics of the manufacturer's own products,'" not "'products of others'").

2. The traditional rule that a manufacturer generally owes no duty of care concerning another manufacturer's product serves admiralty law's underlying purposes.

First, a bright-line rule imposing liability only for harm caused by products that a defendant manufactured or sold adheres to admiralty law's general goals of "simplicity and practicality." *Kermarec*, 358 U.S. at 631. Because defendants know which products they manufacture and supply, the traditional rule enables them to accurately assess their potential "liability and then incorporate the insurance cost into the price of the product." *Kealoha v. E.I. du Pont de Nemours & Co.*, 844 F. Supp. 590, 595 (D. Haw. 1994), *aff'd*, 82 F.3d 894 (9th Cir. 1996). That, in turn, facilitates "the smooth flow of maritime commerce." *Foremost Ins. Co.*, 457 U.S. at 676; *see also Exxon Shipping*, 554 U.S. at 502 (adopting rule that allows parties to "look ahead with some ability to know what the stakes are in choosing one course of action or another"); *E. River S.S.*, 476 U.S. at 870 (rejecting rules that are "too indeterminate to enable manufacturers easily to structure their business behavior").

Second, the traditional rule furthers admiralty law's goal of national uniformity. *See Foremost Ins.*, 457 U.S. at 675; *Calhoun v. Yamaha Motor Corp.*, 216 F.3d 338, 351 (3d Cir. 2000). As just noted, the

traditional rule is easy to apply and thus leads to predictable results. And an easily applied, predictable test is a test capable of uniform application throughout the country. By contrast, a malleable, totality-of-the-circumstances test is not.

Third, the traditional rule promotes "the protection of maritime commerce" by eliminating the substantial burdens of requiring a manufacturer to engage in the costly and duplicative testing of third parties' products. *Exxon*, 500 U.S. at 608; *see* Restatement (Third) of Torts: Prods. Liab. § 5 cmt. a; *Kealoha*, 82 F.3d at 899–900. This concern is heightened in the maritime context, because "[o]n a ship most things are connected to other things," so any attempt to hold one manufacturer liable in admiralty for another's products would "implicate[] a broad[er] class of potential sources of exposure" than in the land-based context. *Stark*, 21 F. App'x at 381; *see also McIndoe v. Huntington Ingalls, Inc.*, 817 F.3d 1170, 1174 (9th Cir. 2016). In addition, admiralty law routinely involves goods like anchors or engines that are made to last for decades. It is thus particularly unreasonable to expect a manufacturer "to anticipate improper installation of all foreseeable aftermarket equipment [to its products,] and to ironclad [them] against every conceivable harm from [the] improper installation" of another manufacturer's defective product. *Westchem Agric. Chems., Inc. v. Ford Motor Co.*, 990 F.2d 426, 430 (8th Cir. 1993).

Finally, maritime law is sometimes described as showing a "special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970). The tradi-

tional rule admittedly does nothing to advance this interest, aside from creating predictable rules on the basis of which sailors (like everyone else) can litigate their cases. But neither does it *hinder* this special solicitude: The traditional rule leaves seamen free to sue those who cause them harm.

3. Because the relevant common-law principle is consistent with the principles of maritime law, it ought to be adopted as the governing principle in maritime law cases.

B. The Third Circuit's *ad hoc* foreseeability test hinders the purposes of maritime law

The Third Circuit did not perform anything like the foregoing analysis. It began by declaring that the question presented—whether maritime-law defendants can be held liable for injuries caused by others' products—turns on foreseeability. The Third Circuit appears to have relied on nothing beyond its own say-so in reaching this conclusion. But regardless, the Third Circuit certainly did not derive the rule from traditional common-law principles, since it did not even consult those principles. Had it done so, it would have recognized one such principle previously invoked by this Court in the maritime-law context: "In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake" on liability. *E. River*, 476 U.S. at 874.

The Third Circuit next considered the purposes of maritime law, but only for assistance in helping it define the breadth of the foreseeability test it had conjured up. The court (for reasons not entirely clear) thought itself tasked with choosing between

two options. On the one hand, a bright-line rule under which injuries caused by others' products are *always* unforeseeable—and thus never give rise to foreseeability. On the other, a totality-of-the-circumstances standard under which such injuries are *sometimes* foreseeable—and thus sometimes give rise to liability. The court looked to the purposes of maritime law in deciding between these options.

This approach is upside down: Rather than identifying a rule and testing it against the purposes of maritime law, the Third Circuit used maritime law to craft the rule in the first place. And in any event, as already explained above, the rule the Sixth Circuit adopted in *Lindstrom*—the "bright-line rule" that is in fact a straightforward application of the principle that defendants are liable only for injuries that they cause—is the one that promotes the purposes of maritime law. *Supra* 24–26.

The Third Circuit's contrary reasoning is unpersuasive. For example, the Third Circuit determined that maritime law's concern with "simplicity and practicality" is *neutral* between a bright-line rule and a totality-of-the-circumstances standard. According to the court, while "'simplicity' might be seen as favoring the rule-based approach," it "could also be seen as favoring a foreseeability-based standard, because simplicity is related to familiarity, and foreseeability is such a familiar and key part of tort law." Pet. App. 13a–14a. None of this makes sense. For one thing, it is not true that familiarity implies simplicity—many familiar tasks are complex to carry out and lead to unpredictable results, as anyone who has attempted to calculate her own taxes can attest. For another, it is particularly dubious to suggest that

foreseeability, which "remains an elusive and indefinite concept" after all these years, *Stockton v. Ford Motor Co.*, 2017 WL 2021760, at *14 (Tenn. Ct. App. May 12, 2017), is simple because it is familiar.

What is more, the concept of foreseeability is especially elusive, indefinite, and incapable of principled application in the bare-metal context. The Third Circuit's opinion directs courts to ask, in assessing foreseeability, whether the defendant "reasonably could have known" that its "product required an asbestos-containing part to function properly." Pet. App. 15a. Relatedly, courts are to consider whether the defendant "reasonably could have known" that its product "was originally equipped with an asbestos-containing part that could reasonably be expected to be replaced over the product's lifetime." *Id.* Making these determinations is an inevitably arbitrary task. If, for example, there are three products that are compatible with a defendant's own product, does a defendant "know" that any given one will be used based on the 33 percent chance that a particular consumer may select it? What about ten alternatives, each with a 10 percent chance of being used? Is a 51 percent likelihood required, and how is that determined?

And what does it mean for equipment to "function properly"? If the product would operate 95 percent of the time without an asbestos-containing part, does the product "require" that part? Could it "reasonably be expected" that the part will be replaced with another asbestos-containing part? How about if the rate drops to 85 percent? Does a product "require" the asbestos-containing part if it would work without it, but slightly less efficiently? What if there is a per-

fect substitute for the asbestos-containing part, but it is twice the price? Three times the price? Ten times the price? One hundred times the price?

In addition to these metaphysical questions, there are practical ones. Most obviously: How far into the future are manufacturers expected to see? If a manufacturer could have reasonably expected that a product would "require" the use of asbestos in the immediate future, but had no idea what alternative technologies might arise later, is the exposure to asbestos six months down the line foreseeable? How about a year? Ten years? Forty years? Does it depend on the state of the science? Does it depend on what the manufacturer *knows* about the state of the science? The Third Circuit's foreseeability approach cannot plausibly be described as simpler and more predictable than a bright-line rule.

To make all of this worse, the Third Circuit's logic extends beyond asbestos cases; it extends to *all* products-liability suits alleging an injury caused by a hazardous substance or component added to a defendant's product post-sale. The breadth of the rule is especially troubling as applied to Navy contractors. As addressed above, the inability to confidently predict potential liability will cause Navy contractors to charge more, or to cease providing goods, frustrating the Navy's interest in efficient procurement contracting. And the Third Circuit's foreseeability test is nothing if not unpredictable. Third Circuit's assessment of maritime law's predictability interest is therefore difficult to credit.

The same goes for its treatment of the interest in promoting maritime commerce and the adoption of uniform rules. Pet. App. 14a–15a. The Third Circuit

concluded that these interests too were neutral between the bright-line rule and the totality-of-the-circumstances standard. This was so, it said, because other courts had adopted *both* approaches, meaning it was impossible to achieve uniformity regardless of the test adopted. This is a *non sequitur*. First, when courts are divided between a bright-line rule that limits liability and a totality-of-the-circumstances standard that expands it, maritime commerce is best promoted by the former, *regardless* of what other courts have done. To be sure, maritime law's interest in *uniformity* is best promoted by adhering to decisions from other courts. But that should have led the Third Circuit to adopt the bright-line rule, which was at the time the *only* rule ever adopted by a federal appellate court.

Having wrongly determined that the foregoing purposes of maritime law were neutral between a bright-line rule and a foreseeability approach, the court below relied exclusively on the "special solicitude" that admiralty courts pay to seamen. And it determined that this policy favored the foreseeability test, because it would "permit a greater number of deserving sailors to receive compensation." Pet. App. 13a. Of course, this Court has never held that maritime law's concern for the welfare of seamen requires whatever rule maximizes their potential recovery. To the contrary, it has emphasized that it is "not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990) (adding: "We will not create, under our admiralty powers, a remedy that is disfavored by a clear majority of the States and that goes well be-

yond the limits of Congress' ordered system of recovery for seamen's injury and death.") Regardless, since the traditional common-law rule is at least consistent with the concern for seamen's welfare, *supra* 25–26, this interest alone does not justify rejecting the traditional rule.

C. The petitioners were entitled to summary judgment under the foregoing principles

Because maritime-law defendants cannot be held liable for injuries caused by third parties' products, the petitioners are not liable as a matter of law for John DeVries's and Kenneth McAfee's injuries. Accordingly, the Third Circuit erred in reversing the District Court's summary judgment awards.

Roberta DeVries claims that her husband was injured by exposure to external asbestos insulation attached to blowers, turbines, and generators manufactured by Westinghouse, and pumps manufactured by Buffalo. But the *DeVries* petitioners did not manufacture or supply any of that insulation. *See* DJA 490. Indeed, even Roberta DeVries's own evidence confirms that "[i]nsulation [was] furnished and installed by the shipbuilder." DJA 695; *see also* DJA 699 ("All other required fittings and attachments will be furnished by the purchaser, including turbine-heat insulation and lagging."); DJA 682 ("The naval architect is responsible to cover the turbines and the other piping insulation in the engine room so that personnel will not be burned.").

The claims in *DeVries* are additionally predicated on the allegation that John DeVries's injuries were caused by exposure to internal asbestos-containing

gaskets and packing used with equipment made by Foster Wheeler and Buffalo. Similarly, Shirley McAfee alleges that her husband contracted cancer caused by exposure to asbestos in replacement parts used with Ingersoll's compressors. None of the petitioners, however, manufactured or supplied any of the asbestos-containing parts to which DeVries and McAfee were allegedly exposed. *See* Pet. App. 4a, 61a, 69a, 78a, 86a.

Because it is undisputed that the petitioners neither made nor sold the asbestos alleged to have caused John DeVries's and Kenneth McAfee's injuries, this case squarely presents the question—on which the circuits are divided—whether products-liability defendants in maritime law cases can be held liable for injuries caused by products that they neither made nor sold. This case thus affords the Court an opportunity to resolve that question, and to correct the Third Circuit's erroneous answer.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

January 31, 2018

Respectfully submitted,

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APPENDIX

APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16-2602 & 16-2669

IN RE: ASBESTOS PRODUCTS
LIABILITY LITIGATION (No. VI)

ROBERTA G. DEVRIES, Administratrix
of the Estate of John B. Devries,
Deceased, and Widow in her own right,
Appellant in 16-2602

IN RE: ASBESTOS PRODUCT
LIABILITY LITIGATION (No. VI)

SHIRLEY MCAFEE, Executrix
of the Estate of Kenneth McAfee,
Deceased, and Widow in her own right,
Appellant in 16-2669

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
District Judge: Honorable Eduardo C. Robreno
(D.C. Nos. 5-13-cv-00474, 5-13-cv-06856,
2-01-md-00875)

Argued March 29, 2017

Before: VANASKIE, SHWARTZ, and RESTREPO,
Circuit Judges

(Opinion Filed: October 3, 2017)

OPINION OF THE COURT

VANASKIE, Circuit Judge.

These asbestos cases involve the availability of the "bare-metal defense" under maritime law. The defense's basic idea is that a manufacturer who delivers a product "bare metal"—that is without the insulation or other material that must be added for the product's proper operation—is not generally liable for injuries caused by asbestos in later-added materials. A classic scenario would be if an engine manufacturer ships an engine without a gasket, the buyer adds a gasket containing asbestos, and the asbestos causes injury to a worker. May the manufacturer be held liable? Some courts say no—never. Others rely on a more fact-specific standard and ask whether the facts of the case made it foreseeable that hazardous

asbestos materials would be used. Neither this Court nor the Supreme Court has confronted the issue.

In that void, we survey bedrock principles of maritime law and conclude that they permit a manufacturer of even a bare-metal product to be held liable for asbestos-related injuries when circumstances indicate the injury was a reasonably foreseeable result of the manufacturer's actions—at least in the context of a negligence claim. The District Court had instead applied the bright line rule approach and entered summary judgment against the plaintiffs. We will vacate the entry of summary judgment on the plaintiffs' negligence claims, affirm the entry of summary judgment on the plaintiffs' product liability claims (which we conclude were abandoned on appeal), and will remand, for further proceedings.

I.

Appellants Roberta G. Devries and Shirley McAfee are the widows of deceased husbands who served in the United States Navy. Each couple filed a Complaint in Pennsylvania state court alleging that the husband contracted cancer caused by exposure to asbestos. Devries alleges that on the *U.S.S. Turner* from 1957-60, her husband was exposed to asbestos-containing insulation and components that were added onto the ship's engines, pumps, boilers, blowers, generators, switchboards, steam traps, and other devices. McAfee alleges her husband was similarly exposed through his service on two ships and in the Philadelphia Naval Shipyard.

Devries and McAfee named a number of defendants, of which Appellee manufacturers ("Manufacturers")

are a subset.[1] The Manufacturers each made their products "bare metal," in that if they manufactured an engine, they shipped it without any asbestos-containing insulation materials that would later be added.

Devries and McAfee's Complaints each allege claims of negligence and strict liability. The Manufacturers removed to the Eastern District of Pennsylvania and invoked the bare-metal defense in support of their respective summary judgment motions, arguing that because they shipped their products bare metal, they could not be held liable for the sailors' injuries. The District Court agreed and granted the Manufacturers summary judgment motions.

Devries and McAfee each appealed separately, raising an issue as to whether the District Court's decision addressed their negligence claims. We summarily remanded with instructions that the District Court address the negligence issue and also consider a split in authority as to whether a bright-line rule or a fact-specific standard governed the bare-metal defense's availability. *In re Asbestos Prods. Liab. Litig.*, No. 15-2667, Order (3d Cir. May 12, 2017) (McAfee); *In re Asbestos Prods. Liab. Litig.*, No. 15-1278, Order (3d. Cir. Feb. 5, 2016) (Devries).

On remand, the District Court applied the bright-line-rule version of the bare-metal defense, and clarified that summary judgment had been entered in favor of the Manufacturers on both the strict liability

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[1] The Appellee-Manufacturers are Air & Liquid Systems Corp., CBS Corp., Foster Wheeler LLC, General Electric Co., IMO Industries Inc., Warren Pumps LLC, and Ingersoll Rand Co.

and negligence claims. The Court reasoned that the rule approach was best because, according to the Court's view of the precedents, maritime law favors uniformity and the rule approach was the majority view.

Devries and McAfee appealed for a second time. We consolidated their appeals and ordered coordinated briefing.

II.

The District Court had federal-officer jurisdiction under 28 U.S.C. § 1442(a)(1), and maritime jurisdiction under 28 U.S.C. § 1333(1). We have jurisdiction under 28 U.S.C. § 1291. We review the District Court's grant of summary judgment *de novo*. *Faush v. Tues. Morning, Inc.*, 808 F.3d 208, 215 (3d Cir. 2015).

III.

The key question in this case is the bare-metal defense's availability: When, if ever, should a manufacturer of a product that does not contain asbestos be held liable for an asbestos-related injury most directly caused by parts added on to the manufacturer's product? Neither the Third Circuit nor the Supreme Court has addressed the question, and the courts from other jurisdictions that have are split. Some courts apply a bright-line rule, holding that a manufacturer of a bare-metal product is never liable for injuries caused by later-added asbestos-containing materials. *See, e.g.*, *Lindstrom v. A-C Prod. Liab. Tr.*, 424 F.3d 488, 492, 494-97 (6th Cir. 2005); *Cabasug v. Crane Co.*, 989 F. Supp. 2d 1027, 1038-43 (D. Haw. 2013). Others apply a more fact-specific standard, stating, for example, that a bare-metal

manufacturer may be held liable if the plaintiff's injury was a reasonably foreseeable result of the manufacturer's conduct. *See, e.g.*, *Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 768-70 (N.D. Ill. 2014) (determining whether the addition of asbestos material was "foreseeable" by asking whether addition of asbestos- containing materials was "inevitable," and whether those added materials were "necess[ary]" or "essential" to the manufacturer's product); *Chicano v. Gen. Elec. Co.*, 2004 WL 2250990, at *6 (E.D. Pa. Oct. 5, 2004) (asking if the addition of asbestos-containing materials was "foreseeable").[2]

In addressing this question, we (1) examine the doctrinal roots of the bare-metal defense, and (2) address how it should be applied in Devries and McAfee's negligence actions.

A.

The doctrinal root of the bare-metal defense has proved to be a particularly vexing question. Some

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[2] Illustrative of the unsettled status of this issue, we recently certified to the Pennsylvania Supreme Court the question of whether under Pennsylvania law a manufacturer of a product can assert the bare metal defense in the context of a negligent failure to warn claim arising out of exposure to asbestos. *See In re Asbestos Products Liability Lit. (No. VI), Crane Co.*, No. 16-3704 (3d Cir. Sept. 27, 2017) (Petition for Certification of Question of State Law).

Whether, under Pennsylvania law, a manufacturer has a duty to warn about the asbestos-related hazards of component parts it has neither manufactured nor supplied.

If such a duty exists, what is the appropriate legal test to determine whether the company is in fact liable for failing to warn about the risks of asbestos?

Id. at 11.

courts have rooted the defense in causation: When if ever can it be said that a bare-metal manufacturer *causes* an asbestos-related injury? *See, e.g.*, *Thurmon v. Ga. Pac., LLC*, 650 F. App'x 752, 756 (11th Cir. 2016) ("the 'bare metal defense' is, essentially, a causation argument"). Others locate the defense in duty: Can a manufacturer's *duty* to act with reasonable care with respect to reasonably foreseeable risks and plaintiffs, be said to extend to asbestos-related injuries? *See, e.g.*, *Quirin*, 17 F. Supp. 3d at 767-70 (reviewing the issue as one of "legal duty"). The question is more than academic. If the elemental root is duty, the defense should be expected to operate differently in strict liability as compared to negligence, because a defendant's duty of course differs between the two types of actions. *See Chesher v. 3M Co.*, 234 F. Supp. 3d, 693, 700-03 (D.S.C. 2017) (holding that the defense should apply in a weaker fashion in a negligence action, as compared to strict liability). The opposite might be true too—the defense should operate in similar fashion in both negligence and strict liability if it is rooted in causation, because the proximate cause inquiry cuts across the two types of actions. *See, e.g.*, *Lindstrom*, 424 F.3d at 492 (suggesting the defense applies similarly under "both negligence and strict liability theories").

We find that both approaches are correct: the defense is rooted in both duty *and* cause because its keystone is the concept of foreseeability. When parties debate the bare-metal defense, they debate when and whether a manufacturer could reasonably foresee that its actions or omissions would cause the plaintiff's asbestos-related injuries. The bright-line rule approach says it is never reasonably foreseeable, and

the fact-specific standard approach says it sometimes is. This debate over foreseeability sounds in both duty and cause, because foreseeability is a concept embedded in each element. *See Gibbs v. Ernst*, 647 A.2d 882, 891 (Pa. 1994) (highlighting "the common law notion of foreseeability as found in the concepts of duty and proximate cause"). In the duty element in a negligence action, foreseeability limits a defendant's liability to only the risks and plaintiffs that are reasonably foreseeable. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 7, cmt. j (2010 Am. Law Inst.) (acknowledging "widespread use" of foreseeability as an aspect of the duty of reasonable care, despite the Restatement's disagreement with such an approach). And in proximate cause, foreseeability limits a defendant's liability to only the injuries that are a reasonably foreseeable result of the defendant's actions. *Id.* § 29, cmt. j (discussing foreseeability as an aspect of proximate cause in both negligence and strict-liability actions).[3] Thus, the bare-metal defense is nothing more than the concept of foreseeability, as embedded in the duty of reasonable care in a negligence action and the

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[3] Instead of starting from subject-specific asbestos cases, we begin our focus with the ordinary and traditional principles of maritime and tort law, as exemplified in the most reliable treatises and restatements. *Cf. M&G Polymers USA, LLC v. Tackett*, 135 S. Ct. 926, 929-30 (2015) (abrogating a circuit's labor-law-specific rule for contract interpretation, and calling on lower courts in labor-law cases to still adhere to "ordinary" and "traditional" principles of contract law); *Paroline v. United States*, 134 S. Ct. 1710, 1719-20 (2014) (citing, as authority for the federal common law of proximate cause, the Restatement (Third) of Torts, Prosser and Keeton's treatise on torts, and LaFave's treatise on criminal law).

proximate cause standard in a negligence or strict-liability action, as applied to the facts of a certain subset of asbestos cases.

This dual-elemental home for the defense does not, however, totally explain when or whether the defense's application should differ from strict-liability to negligence. It might be that the defense could apply the same in both types of actions, because of the shared proximate-cause element. Or the differences in the two actions' duty elements might mean the defense is more forceful in one action than the other. *See, e.g.*, *Chesher*, 234 F. Supp. 3d at 700-03 (holding that the defense is weaker in negligence and stronger in strict liability, because in strict liability the manufacturer's duty is limited to the product, but with negligence the duty extends further); *Bell v. Foster Wheeler Energy Corp.*, No. 15-6394, 2016 WL 5780104, at *5-7 (E.D. La. Oct. 4, 2016) (same). And of course the facts of a given case could be the most important variable.

We need not settle these doctrinal distinctions today, because Devries and McAfee waived their strict liability claim in this appeal. As a general matter, an appellant waives an argument in support of reversal if it is not raised in the opening brief. *McCray v. Fidelity Nat'l Title Ins. Co.*, 682 F.3d 229, 241 (3d Cir. 2012). Here, in this appeal Devries and McAfee focused the entirety of their briefing on their negligence claims, yet attempted to also incorporate their strict-liability claim through a footnote: "By concentrating on [negligence] issues in this brief, Appellants do not waive any issues argued in their original briefs as to Defendants' liability under [the strict liability claims]." (Appellants' Br. at 2 n. 1). This attempt to

shoehorn in an argument outside the briefs is insufficient to raise an issue on appeal. *See John Wyeth & Brother Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n. 6 (3d Cir. 1997) (stating that "arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived"); *see also Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 202-04 (3d Cir. 2004) (declining to consider arguments not properly raised and therefore waived). In particular, it fails to give fair notice of the claims being contested on appeal. Thus, Devries's and McAfee's waiver of their strict-liability arguments means that we will affirm the District Court's decision to that extent, and need not fully explore the precise contours of the defense's distinctions in strict liability and negligence, beyond the unifying principle of foreseeability.

B.

For the negligence claims, rooting the bare-metal defense in foreseeability does not on its own resolve the issue, because the split in authority can be characterized as a debate over what a bare-metal manufacturer could reasonably foresee—no asbestos-related injuries, *see, e.g.*, *Lindstrom*, 424 F.3d at 492, 494-97, or some, *see, e.g.*, *Quirin*, 17 F. Supp. 3d at 769-70.

These two choices raise familiar tradeoffs between rules and standards.[4] A rule is a legal directive that

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[4] For a review of the characteristics and tradeoffs of rules and standards, *see* Bryan A. Garner et al., *The Law of Judicial Precedent* 78 (2016) (noting that "*rules* and *standards* . . . denote different levels of specificity for norms" and "judicial holding[s]"); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—*

attempts to capture a background principle into an easy-to-apply form that is predictable and efficient. A speed limit is a good example: its goal is road safety, but because liability turns on speed rather than the amorphous definition of "safety" itself, it is easier for drivers, police, and insurers to shape their conduct accordingly. Rules have downsides though too, in that they necessarily result in errors of over- and under-inclusion. In the case of the speed limit, it furthers the policy of road safety, but does so imperfectly: speedy drivers get punished even if they speed safely, and slow drivers go free even if they amble along haphazardly.

A standard, on the other hand, collapses the background principle into the actual legal directive, resulting in better accuracy and "fit" with the underlying purpose, and fewer errors of over- and under-inclusion. Another road-safety example would be a reckless-driving prohibition that simply prohibits driving that is "reckless." Such a prohibition is less predictable and efficient than the speed limit, in that it is harder to predict what a decisionmaker will find to be "reckless" than whether he or she will agree that 76 miles per hour exceeds a 70 m.p.h. speed limit. But liability better tracks the actual goal of road safety, because almost all "reckless" drivers are unsafe.

The point is there are tradeoffs, and courts face those tradeoffs in choosing an approach to the bare-metal defense. The rule-based approach is efficient and predictable—bare-metal manufacturers are simply not liable—but the downside is some deserving

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Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 58-59 (1992).

sailor-plaintiffs will not receive their due. On the other hand, the standard-based approach is bound to be less predictable and less efficient, because the standard's fact-centered nature will push more cases into discovery, *see, e.g.*, *Quirin*, 17 F. Supp. 3d at 771-72 (denying defendant's motion to dismiss after applying the standard), but the most-deserving sailor-plaintiffs are less likely to be denied compensation.

Thankfully, we do not weigh these tradeoffs in a vacuum. Maritime law is undergirded by established principles, at least four of which are implicated here. First and perhaps foremost, maritime law is deeply concerned with the protection of sailors, due to a historic and "special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970). This "special solicitude" developed "unknown to the common law," and so maritime law is at times more lenient toward a sailor than a state's common law may be to a similarly-situated plaintiff. *Id.* This divergence is acceptable if not appropriate because the "humane and liberal character of" maritime law counsels that it is better "to give than to withhold the remedy" wherever "established and inflexible rules" do not require otherwise. *Id.* (quoting *The Sea Gull*, 21 F. Cas. 909, 910 (C.C. Md. 1865)). For example, in *Moragne v. States Marine Lines*, the Supreme Court made it permissible for maritime plaintiffs to bring wrongful death actions even though the common law disapproved of such actions. 398 U.S. at 381-88, 408-09. In arriving at that holding, the Court explicitly referenced and discussed maritime law's special solicitude for sailor safety and how that solicitude

permitted maritime law to have more sailor-friendly rules than the common law. *Id.* at 386-88.[5]

Here, maritime law's special solicitude for sailors' safety similarly favors the adoption of the standard-like approach to the bare-metal defense. A standard will permit a greater number of deserving sailors to receive compensation, and compensation that is closer to what they deserve. Given that results for sailor-victims will differ under a rule as compared to a standard, and since no "established" or "inflexible" rule prohibits the more forgiving standard, the "humane and liberal character" of maritime law counsels that we follow the standard. Even if certain states' common laws would call for a more stringent rule, maritime law's more liberal attitude permits us to diverge from that path.

Second, maritime law is built on "traditions of simplicity and practicality," *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959), but that principle cuts in both directions and does not provide much guidance. On one hand, "simplicity" might be seen as favoring the rule-based approach, because simplicity is related to predictability, and it is easier to predict how a rule will apply than a standard. On the other hand, "simplicity" could also be seen as favoring a foreseeability-based standard, because simplicity is related to familiarity, and foreseeability

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[5] *Moragne*'s holding was based most directly on principles other than the special solicitude for sailor safety, but the special solicitude was still crucial to the Court's decision because it explained why the Court's ruling was appropriate even though it likely diverged from the common law. *Moragne*, 398 U.S. at 386-88.

is such a familiar and key part of tort law. *See id.* at 631-32 (choosing to adopt a familiar standard over a "foreign" and "alien" rule while invoking maritime law's "traditions of simplicity and practicality").

The third and fourth principles implicated in this case are also not particularly helpful. Maritime law has a "fundamental interest" in "the protection of maritime commerce," *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (quoting *Sisson v. Ruby*, 497 U.S. 358, 367 (1990)), and seeks out "uniform rules to govern conduct and liability," *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75 (1982). Here, the parties all argue these two principles encourage the Court to side with whatever side is winning in the split in authority. The idea is that the sooner one side wins out over the other, the sooner the split in authority is ended and the goals of seamless commerce and uniformity of rules will be achieved. The rub, however, is determining which view is the majority. The bright-line rule could be said to be in the lead because it has on its side the Sixth Circuit, the only court of appeals to weigh in. *Lindstrom*, 424 F.3d at 492, 494-97. The standard could similarly be said to be the majority view because the courts that have confronted the question most recently have generally favored the standard, and have done so after a much more thorough analysis than that found in the Sixth Circuit's opinion in *Lindstrom*, which was decided much earlier in the debate over the bare-metal defense. *Compare Chesher*, 234 F. Supp. 3d at 696-712 (analyzing in painstaking detail the split in authority and adopting a version of the standard); *Bell*, 2016 WL 5780104, at *3-7 (same), *with Lindstrom*, 424 F.3d at 494-97 (not mentioning the split in authority). We

need not decide which approach is winning in terms of wins and losses—it is enough that the score is too close for us to say that the goals of seamless commerce and rule-uniformity push in one way or the other.

In sum, the special solicitude for the safety and protection of sailors is dispositive, because it counsels us to follow the standard-based approach, and none of the other principles weigh heavily in either direction. The standard-based approach is the one we will therefore follow: foreseeability is the touchstone of the bare-metal defense; a manufacturer of a bare-metal product may be held liable for a plaintiff's injuries suffered from later-added asbestos-containing materials if the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's failure to provide a reasonable and adequate warning; and although cases will necessarily be fact-specific, already-decided precedents show, for example, that a bare-metal manufacturer may be subject to liability if it reasonably could have known, at the time it placed its product into the stream of commerce, that

(1) asbestos is hazardous,[6] and

(2) its product will be used with an asbestos-containing part,[7] because

(a) the product was originally equipped with an asbestos containing part that could reasonably be expected to be replaced over the product's lifetime,[8]

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[6] *See Bell*, 2016 WL 5780104, at *5.

[7] See id.

[8] *See Chesher*, 234 F. Supp. 3d at 714; *Quirin*, 17 F. Supp. 3d at 769-71.

(b) the manufacturer specifically directed that the product be used with an asbestos-containing part,[9] or

(c) the product required an asbestos-containing part to function properly.[10]

These may or may not be the only facts on which liability can arise. The finer contours of the defense, and how it should be applied to various sets of facts, must be decided on a case-by-case basis.

IV.

Finally, the Manufacturers advanced two alternative arguments in support of an affirmance on the negligence claims. They argued (1) insufficient evidence had been presented as to causation and was fatal to Devries and McAfee's claims, and (2) the government-contractor defense should insulate the Manufacturers from liability. These arguments were also presented below, but the District Court declined to rule on them because its bare-metal-defense holding was sufficient to enter summary judgment in favor of the Manufacturers. The Manufacturers urge us to address them now, on the grounds that we may affirm a judgment for any reason supported by the record. *Brightwell v. Lehman*, 637 F.3d 187, 191 (3d Cir. 2011). Addressing alternative grounds for affirmance, however, is a matter left to our discretion. *See Gov't of the V.I. v. Walker*, 261 F.3d 370, 376-77 (3d Cir. 2001) (declining to reach arguments raised before but not decided by the lower court, and instead remanding).

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[9] *See Bell*, 2016 WL 5780104, at *5, 7.

[10] *See Chesher*, 234 F. Supp. 3d at 714; *Quirin*, 17 F. Supp. 3d at 769-70.

Given that we are without the benefit of the District Court's well-regarded expertise, and the parties' briefing and oral argument was appropriately focused on the bare-metal defense, we will leave the insufficient-evidence and contractor-defense arguments to be dealt with on remand.

V.

In conclusion, maritime law's special solicitude for the safety and protection of sailors counsels us to adopt a standard-based approach to the bare-metal defense that permits a plaintiff to recover, at least in negligence, from a manufacturer of a bare-metal product when the facts show the plaintiff's injuries were a reasonably foreseeable result of the manufacturer's conduct. We will affirm the decision of the District Court with respect to Devries and McAfee's strict liability claims, and remand for further proceedings on their negligence claims consistent with this Opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

KENNETH E. MCAFEE, et al. v. 20TH CENTURY GOVE CORP. OF TEXAS, et al	CONSOLIDATED UNDER MDL 875 E.D. PA CIVIL ACTION NO. 13-CV-06856

ORDER

AND NOW, this **25th** day of **May, 2016**, upon receipt of the Third Circuit Court of Appeal's May 11, 2016 remand order seeking this Court's guidance as to whether, in granting summary judgment in favor of Ingersoll-Rand & Company on October 22, 2014 (ECF No. 218), it:

> (1) considered the negligence theory, (2) concluded that the bare metal defense applies to it and why, or (3) considered whether the circumstances listed in the cases cited herein should apply to a negligence claim brought under maritime law (and if not, why not, and if so, why and whether the record here would support such a claim)

In re: Asbestos Products, Docket No. 15-02667, Doc. 35 (3d Cir. Jul 16, 2015), it is hereby **ORDERED** that this Court **REAFFIRMS** its October 22, 2014 entry of

judgment and directs any interested parties to its reasoning set forth in its May 19, 2016 explanatory order in *Devries v. General Electric Co.*, 13-cv-474 Doc. 369 which responds directly to these questions and explains how the Court considers a Plaintiff's negligence claim in the maritime context and why it applies the so called "bare metal defense" thereto.

IT IS SO ORDERED

/s/ Eduardo Robreno
EDUARDO C. ROBRENO, J.

APPENDIX C

John B. DEVRIES, et al., Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al., Defendants.

CONSOLIDATED UNDER MDL 875
E.D. PA CIVIL ACTION
NO. 5:13-00474-ER

United States District Court,
E.D. Pennsylvania.

Signed May 18, 2016

Filed May 19, 2016

Robert E. Paul, Paul Reich & Myers, PC, Philadelphia, PA, for Plaintiffs.

Stewart R. Singer, Salmon Ricchezza Singer & Turchi LLP, Philadelphia, PA, for Defendants.

MEMORANDUM

EDUARDO C. ROBRENO, District Judge

This case was removed in January of 2013 from the Court of Common Pleas of Philadelphia to the United States District Court for the Eastern District of Pennsylvania, where it became part of the consolidated asbestos products liability multidistrict litigation (MDL 875). The basis of jurisdiction is

federal question jurisdiction (pursuant to 28 U.S.C. § 1442).

Plaintiffs allege that John DeVries was exposed to asbestos from various products while serving in the U.S. Navy during the time period 1957 to 1960. After the completion of discovery, numerous defendants moved for summary judgment, contending that Plaintiffs' evidence was insufficient to establish causation with respect to any product(s) for which it could be held liable. This Court determined that maritime law was applicable to the claims against each of the product manufacturer Defendants now opposing Plaintiffs' appeal[1] and, after applying maritime law (including the so-called "bare metal defense" as applied under maritime law), granted each of these Defendants' motions.

Plaintiffs thereafter appealed, contending that this Court misapplied the maritime law "bare metal defense" and, in particular, that it failed to consider the viability of Plaintiffs' negligence claims. By way of Order dated February 5, 2016 (the "February 5th Order") (ECF No. 368 in D.C. No. 5:13-cv-474), the United States Court of Appeals for the Third Circuit remanded the case to this MDL Court for explicit consideration and clarification of the issues of whether this MDL Court (1) considered the negligence theory of liability when it granted summary judgment in its entirety to the product manufacturer defendants, (2) concluded that the "bare metal defense" applies to claims sounding in negligence, and (3) considered

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[1] These product manufacturer Defendants are: Buffalo Pumps, Inc., CBS Corporation, Foster Wheeler LLC, General Electric Company, IMO Industries, Inc., and Warren Pumps.

whether the circumstances of the present case warrant application of the legal rationale by which certain other courts' decisions (identified in the February 5th Order) exempted negligence claims from being barred by the defense. As directed by the February 5th Order, the Court hereby clarifies its application of the so-called "bare metal defense," as recognized by maritime law, to claims brought by Plaintiffs against the appealing product manufacturer Defendants.

I. Background and History Surrounding the MDL's Adoption of the Maritime Law "Bare Metal Defense"

By way of the decision in *Conner v. Alfa Laval, Inc.*, 842 F.Supp.2d 791 (E.D.Pa. 2012) (Robreno, J.), this MDL Court adopted the so-called "bare metal defense" as applied by the United States Court of Appeals for the Sixth Circuit in two separate maritime law cases:[2]

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[2] In addition, the Court notes that, at the time of its decision to adopt the *Lindstrom* rule in February of 2012, the "bare metal defense" (although not necessarily identified with that coinage) had already been considered by a magistrate judge in the MDL, who had issued a Report and Recommendation that reached the same conclusion regarding the application of the "bare metal defense" under maritime law. *See Sweeney v. Saberhagen Holdings, Inc.*, No. 09–64399, 2011 WL 346822, at *6 (E.D.Pa. Jan. 13, 2011) (Strawbridge, M.J.). The Court accepted and adopted the recommendation, and applied it in deciding summary judgment motions in *Sweeney v. Saberhagen Holdings, Inc.*, No. 09-64399, 2011 WL 359696 (E.D.Pa. Feb. 3, 2011) (Robreno, J.), *Delatte v. A.W. Chesterton Co.*, No. 0969578 (multiple summary judgment motions decided, e.g. 2011 WL 4910416 (E.D.Pa. Feb. 28, 2011) (Robreno, J.)), and *Ferguson v. Lorillard Tobacco Co., Inc.*, No. 09-91161 (multiple summary judgment

Lindstrom v. A–C Product Liability Trust, 424 F.3d 488 (6th Cir.2005) and *Stark v. Armstrong World Industries, Inc.*, 21 Fed.Appx. 371 (6th Cir.2001)[3]—decisions consistent with, and bolstered by, the then-governing[4] decisions on the issue under California and Washington state law. At the time of this MDL Court's decision in *Conner*, the Sixth Circuit was the only federal appellate court to have considered the so-

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motions decided, e.g., 2011 WL 4910416 (E.D.Pa. Mar. 2, 2011) (Robreno, J.)).

[3] *Stark*, standing alone, does not provide a comprehensive outline of the "bare metal defense" and its application under maritime law because it addresses only strict liability claims (while acknowledging the possibility of negligent failure-to-warn claims apparently not pursued by that plaintiff). 21 Fed.Appx. at 374–75. Nonetheless, it begins the development of the defense under maritime law and is cited repeatedly by the Sixth Circuit in *Lindstrom*, which further expounds upon the rules of law underlying the "defense."

[4] As this MDL Court acknowledged in *Schwartz v. Abex Corp.*, 106 F.Supp.3d 626 (E.D.Pa.2015) (Robreno, J.), "the Supreme Court of Washington appears to have since retreated somewhat from its earlier adoption of the so-called 'bare metal defense' in *Simonetta* [*v. Viad Corp.*, 165 Wash.2d 341, 197 P.3d 127 (Wash.2008),] and *Braaten* [*v. Saberhagen Holdings*, 165 Wash.2d 373, 198 P.3d 493 (Wash.2008)]. . . [by later] distinguish[ing] the facts in *Macias v. Saberhagen Holdings, Inc.*, 175 Wash.2d 402, 282 P.3d 1069 (Wash.2012), and holding that a product manufacturer can at least sometimes be liable for failure to warn of the hazards of asbestos exposure that necessarily occurs as a result of the intended use of the product for the purpose for which it was designed — even if the product itself did not contain asbestos when manufactured and supplied, and the asbestos was released from another manufacturer's product." However, at the time of this MDL Court's February 1, 2012 adoption of the "bare metal defense" under maritime law, the defense was still the clear governing rule in Washington.

called "bare metal defense" under maritime law (or any other law) in the context of asbestos litigation. The only two states whose highest courts had considered the issue in the context of asbestos litigation were California (in *O'Neil v. Crane Co.*, 53 Cal.4th 335, 135 Cal.Rptr.3d 288, 266 P.3d 987 (2012)) and Washington (in *Simonetta v. Viad Corp.*, 165 Wash.2d 341, 197 P.3d 127 (Wash.2008), and *Braaten v. Saberhagen Holdings*, 165 Wash.2d 373, 198 P.3d 493 (Wash.2008)).[5]

In deciding to adopt the decisions of the Sixth Circuit, this MDL Court was mindful that—unlike the present case presented by the DeVries Plaintiffs—the bulk of the thousands of asbestos cases pending in the MDL originated in the Sixth Circuit and would be remanded for trial (after completion of the MDL pre-trial process) to a district court within the Sixth Circuit (specifically, the United States District Court

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[5] A short, chronological summary of appellate precedent on the "bare metal" issue in asbestos cases (nationwide) at the time of this MDL Court's decision in *Conner* is as follows: (1) *Stark* (6th Cir.2001) (addressing only strict liability claims under maritime law); (2) *Lindstrom* (6th Cir.2005) (addressing negligence and strict liability claims under maritime law); (3) *Simonetta* (Wash.2008) (addressing negligence and strict liability claims under Washington law); (4) *Braaten* (Wash.2008) (negligence and strict liability claims under Washington law); (5) *O'Neil* (Cal.2012) (addressing negligence and strict liability claims under California law). Each of these decisions barred all of the types of claims it considered where there was no (or insufficient) evidence of exposure to asbestos from a "product" (or component part) that the defendant(s) either manufactured or supplied.

for the Northern District of Ohio—the same district in which *Lindstrom* and *Stark* were initially decided).[6]

It is true that, in general, matters of substantive federal law (such as maritime law) are applied by an MDL Court in accordance with the law of the Circuit in which it sits (in the case of this MDL, the law of the Third Circuit). *See, e.g., Various Plaintiffs v. Various Defendants* ("The Oil Field Cases"), 673 F.Supp.2d 358, 363 n. 3 (E.D.Pa.2009) (Robreno, J.) ("in cases where jurisdiction is based on federal question, this Court, as the transferee court, will apply federal law as interpreted by the Third Circuit"); *In re Korean Air Lines Disaster*, 829 F.2d 1171, 1178 (D.C.Cir.1987); *Menowitz v. Brown*, 991 F.2d 36, 40–41 (2d Cir.1993) ("a transferee federal court should apply its interpretations of federal law, not the constructions of federal law of the transferor circuit"); *In re Temporomandibular Joint (TMJ) Implant Prod. Liab. Litig.*, 97 F.3d 1050, 1055 (8th Cir.1996) (holding that "[w]hen analyzing questions of federal law, the transferee court should apply the law of the circuit in which it is located"); *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994); *Murphy v. F.D.I.C.*, 208 F.3d 959, 965–66 (11th Cir.2000); *see also In re Donald J. Trump Casino Securities Litigation–Taj Mahal Litigation*, 7 F.3d 357, 368 n. 8 (3d Cir.1993) (assuming without deciding that the district court correctly applied *In re Korean Air Lines Disaster*, 829 F.2d at 1176, in holding that Third Circuit precedent would control interpretations of federal law, but that

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[6] Specifically, these are the cases that comprise the MDL-875 maritime docket (often referred to as "MARDOC"). No. 2:02-md-00875 (master docket).

the law of the transferor circuit merited close consideration); ***Eckstein v. Balcor Film Investors***, 8 F.3d 1121, 1126–27 (7th Cir.1993) (holding that a transferee court is not required to defer to the interpretation of federal law utilized by the transferor court and should, generally utilize its own independent judgment regarding the interpretation of federal law, and concluding that, "a transferee court should use the rule of the transferor forum," but only when there is a discrepancy in law between the two forums); ***McMasters v. U.S.***, 260 F.3d 814, 819 (7th Cir. 2001) (same). Importantly, however, the matter of the "bare metal defense" had never been squarely addressed by the Third Circuit in the context of asbestos litigation (or any other type of litigation). Therefore, the matter was one of "first impression" in the Third Circuit, for which there was no binding precedent.

This MDL Court was mindful that applying an interpretation of maritime law on the matter that was inconsistent with that of the Sixth Circuit would give rise to inconsistencies in the handling and outcome of the thousands of cases pending in the MDL, as some cases were being resolved in the MDL Court during the pretrial phase (by way of summary judgment, settlement, etc.), while, pursuant to the requirements of 28 U.S.C. § 1407 and the Supreme Court decision in ***Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach***, 523 U.S. 26, 118 S.Ct. 956, 140 L.Ed.2d 62 (1998), those continuing on to trial in the transferor court would receive application of maritime law by a trial court located within the Sixth Circuit (which would, presumably, apply its own precedents interpreting maritime law on the matter). In all of its

cases, the MDL Court has sought to ensure consistency in the handling of cases. *See In re Korean Air Lines Disaster*, 829 F.2d at 1175–76 (citing uniformity in the application of federal law as a primary goal in the context of a discussion of choice-of-Circuit-law by federal transferee courts in cases transferred to an MDL court pursuant to 28 U.S.C. § 1407); *Menowitz v. Brown*, 991 F.2d at 41 ("It would be unwieldy, if not impossible, for a court to apply differing rules of federal law to various related cases consolidated before it.").

Although the present case brought by the DeVries Plaintiffs is not part of the maritime docket of cases ("MARDOC"), the application of federal maritime law therein should be consistent with—and in uniformity with—that applied in the MARDOC cases. *See id.* In setting forth guidance on this matter, now-Supreme Court Justice Ginsburg wrote:

> For the adjudication of federal claims, . . . "[t]he federal courts comprise a single system [in which each tribunal endeavors to apply] a single body of law[.]"
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> * * *
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> Application of *Van Dusen* in the matter before us, we emphasize, would not produce uniformity. There would be one interpretation of federal law for the cases initially filed [or decided] in districts within [one] Circuit, and an opposing interpretation for cases filed [or decided] elsewhere. . . . Indeed, **because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations simultaneously is inherently**

> **self-contradictory**. Our system contemplates differences between different states' laws; thus a multidistrict judge asked to apply divergent state positions on a point of law would face a coherent, if sometimes difficult, task. But **it is logically inconsistent to require one judge to apply simultaneously different and conflicting interpretations of what is supposed to be a unitary federal law**.

In re Korean Air Lines Disaster, 829 F.2d at 1175–76(internal citations omitted) (emphasis added). In considering the adoption of *Lindstrom*'s maritime law "bare metal defense," this MDL Court explained in *Conner*:

> [W]here, as here, a defense arises under federal law and the U.S. Supreme Court has not ruled on the issue, the transferee court typically applies the law of the circuit in which it sits, that is, Third Circuit law. *See, e.g., Oil Field Cases*, 673 F.Supp.2d 358, 362–63 (E.D.Pa.2009) (Robreno, J.). **The law of a transferor forum "merits close consideration**, but does not have stare decisis effect" on the transferee court. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1176 (D.C.Cir.1987), *aff'd sub nom. Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989); *see also* Federal Judicial Center, Manual for Complex Litigation § 20.132, at 222 (4th ed. 2004) ("**Where the claim or defense arises under federal law, however, the transferee judge should consider whether to apply the law of the transferee circuit or that of the transferor court's circuit. . . .**").

842 F.Supp.2d at 794 n. 4(emphasis added).

In sum, in the absence of Third Circuit precedent on this issue of maritime law (and the absence of any other precedent on the matter from any United States Court of Appeals), this court factored in (1) the goal of uniformity of application of maritime law (both within and beyond the MDL), (2) the fact that, at the time, the Sixth Circuit precedent of *Lindstrom* was (a) the only pronunciation of maritime law on the matter from any federal appellate court, and (b) the "majority rule" (i.e., in keeping with the rulings of the only two states whose highest courts had considered the issue, and also in keeping with an earlier recommendation by an MDL-875 magistrate judge), and (3) policy considerations surrounding products liability law. *See* 842 F.Supp.2d at 800–01. After doing so, it decided to adopt the holdings of *Lindstrom* in applying the maritime law "bare metal defense" in cases pending in MDL-875. Since its adoption of the *Lindstrom* rule in 2012, the MDL Court has consistently applied the rule in dozens of cases (and hundreds of summary judgment motions) governed by maritime law.

II. Application of the "Bare Metal Defense" Under *Lindstrom's* Pronunciation of Maritime Law

A. In General

Under maritime law, as set forth in *Lindstrom*, a plaintiff must show evidence of (sufficient) exposure to asbestos from a defendant's own "product" in order to hold a product manufacturer liable under any theory of liability (whether strict liability or negligence). *See Lindstrom*, 424 F.3d at 492, 496–97. Necessarily, then, maritime law imposes no duty upon a product

manufacturer to warn of the dangers associated with another manufacturer's "product" (or component part). *See id.* For this reason, there can be no liability in negligence for asbestos exposure arising from a product (or component part) that a manufacturer defendant did not manufacture or supply (as a plaintiff will not be able to establish the breach of any duty to warn about that other product).

To be sure, despite acknowledging the availability under maritime law of a negligence[7] cause of action against a product manufacturer, *see* 424 F.3d at 492, the *Lindstrom* Court nonetheless explicitly stated that, under maritime law, a product manufacturer (such as a pump manufacturer) "cannot be held responsible for the asbestos contained in another product" (such as a gasket used in connection with a pump, but which the pump manufacturer neither manufactured nor supplied),[8] 424 F.3d at 496 (citing

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[7] For the sake of clarity, this MDL Court notes that it deems a "negligent failure-to-warn claim" to be a type of common law *negligence* claim. A separate (but related) warning-related claim exists in *strict liability* (and is, under some states' law, subject to different analysis): defective warning and/or defective design (insofar as the alleged defective design is a design with either no warning or a deficient warning).

[8] In *Lindstrom*, defendant Coffin (a pump manufacturer) was sued for asbestos exposure arising from the following products used in connection with its pumps: (1) external insulation, (2) replacement gaskets, (3) original packing rings, and (4) replacement packing rings. The Sixth Circuit held that defendant Coffin could not be liable for asbestos in any of these (except for the original packing rings) because there was no evidence that they were manufactured (or supplied) by it. Although it acknowledged that defendant Coffin would be liable for asbestos exposure arising from the original packing rings

Stark, 21 Fed.Appx. at 381), and "cannot be held responsible for asbestos containing material that [ ] was incorporated into its product post-manufacture."[9] *Id.* at 497 (citing *Stark*, 21 Fed. Appx. at 381). Intrinsic in these holdings are the conclusions that, in

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(because the evidence indicated that they were manufactured (and/or supplied) by defendant Coffin with its pumps), Coffin faced no liability in connection with these asbestos products, because there was no evidence that the plaintiff was exposed to respirable dust from these original packing rings—and, to the contrary, there was testimony from plaintiff that the rings were *not* "dusty" when he removed them (i.e., there was no evidence of exposure to asbestos in connection with these products).

[9] The *Lindstrom* court found that Ingersoll Rand, a defendant who manufactured air compressors, was not liable for asbestos exposure arising from packing material that was used in its air compressors, but which it did not manufacture (or supply). In explaining the rule of maritime law, the court wrote:

> **Even if** [plaintiff] Lindstrom's testimony is sufficient to establish that **he came in contact with sheet packing material containing asbestos in connection with an Ingersoll Rand air compressor**, [product manufacturer defendant] Ingersoll Rand cannot be held responsible for asbestos containing material that [ ] was incorporated into its product post-manufacture. *See Stark*, 21 Fed.Appx. at 381; *Koonce v. Quaker Safety Products & Mfg. Co.*, 798 F.2d 700, 715 (5th Cir.1986). ***Lindstrom* did not allege that any Ingersoll Rand product itself contained asbestos**. As a result, plaintiffs-appellants cannot show that an Ingersoll Rand product was a substantial factor in *Lindstrom*'s illness, and we therefore affirm the district court's grant of summary judgment in Ingersoll Rand's favor.

424 F.3d at 497 (emphasis added).

the maritime law regime, an asbestos product manufacturer defendant (1) has no "duty" to warn about a "product" that it did not manufacture or supply (and has a "duty" to warn only about "products" it manufactured or supplied), and, in keeping with this delineation of "duty," (2) can only be liable in negligence if there is evidence of (a sufficient amount of) exposure to asbestos from a "product" it manufactured or supplied, in part because the "causation" element is not satisfied (i.e., a "breach" of the "duty" to warn has only "caused" the injury at issue where the alleged asbestos exposure has arisen from a "product" for which the manufacturer defendant had a "duty" to warn). *See Lindstrom*, 424 F.3d at 492, 496–97.[10]

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[10] This is apparent from the Sixth Circuit's explanation and discussion. At the risk of repetition, for the sake of clarity and to be fully responsive to the questions posed by the Third Circuit on remand, that discussion, verbatim, was as follows:

> (1) "Even if [plaintiff] Lindstrom's testimony is sufficient to establish that he came in contact with sheet packing material containing asbestos in connection with an Ingersoll Rand air compressor, **Ingersoll Rand cannot be held responsible for asbestos containing material that [ ] was incorporated into its product post-manufacture.** *See Stark*, 21 Fed.Appx. at 381; *Koonce*, 798 F.2d at 715. Lindstrom did not allege that any Ingersoll Rand product itself contained asbestos. As a result, plaintiffs-appellants cannot show that an Ingersoll Rand product was a substantial factor in Lindstrom's illness, and we therefore affirm the district court's grant of summary judgment in Ingersoll Rand's favor." 424 F.3d at 497 (emphasis added); and

In adopting the rules of *Lindstrom*, this MDL Court made clear in *Conner* that it was aware of and had considered the negligence claims of the plaintiffs therein—and that it was applying the *Lindstrom* rule(s) not only to the plaintiffs' strict liability claims, but also to their negligence claims. Specifically, the *Conner* opinion stated that, "[h]aving held as a matter of law that a manufacturer is not liable for harm caused by the asbestos products that it did not manufacture or distribute . . . Defendants are entitled to summary judgment on Plaintiffs' products-liability claims based on **strict liability and negligence**." 842 F.Supp.2d at 803 (emphasis added). This MDL Court's subsequent application of *Conner* in dozens of cases (including the present case) has consistently applied the rules of *Lindstrom* and *Conner* as a bar to both types of claims.

B. Uniform Application to Negligence Claims and Strict Liability Claims

Maritime law (as set forth in *Lindstrom* and *Stark*) bars both negligent failure-to-warn claims and strict

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> (2) "The information presented establishes that the only asbestos-containing products, aside from the graphite-coated packing rings, to which Lindstrom was exposed in connection with any Coffin Turbo products were not manufactured by Coffin Turbo, but rather products from another company that were attached to a Coffin product. **Coffin Turbo cannot be held responsible for the asbestos contained in another product.**" *Id.* at 496 (emphasis added).

See also footnote 11 herein (discussing "duty" and "causation" as set forth by *Lindstrom*), and footnote 12 herein (discussing "product" as defined by *Lindstrom*).

product liability claims[11] in the absence of (sufficient) evidence of exposure to asbestos from the defendant's

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[11] As explained by this MDL Court in *Conner*, the reason the defense applies equally and uniformly to both types of claims under maritime law is that, under maritime law's construction and definition of the term "product" (i.e., that product for which a given defendant can be liable), as set forth in *Lindstrom*, (there is an inability of a plaintiff to establish causation with respect to the defendant's "product" (i.e., a sufficient amount of exposure to asbestos from the defendant's product—as opposed to asbestos from the product of another manufacturer/supplier that is used in connection with the defendant's product but was neither manufactured nor supplied by the defendant)), regardless of the theory of liability underlying the claim (as a showing of causation is required for both negligence and strict liability claims). 842 F.Supp.2d at 797 (citing *Lindstrom*). In *Lindstrom*, the Sixth Circuit explicitly stated this rule of maritime law:

> Plaintiffs in products liability cases under maritime law may proceed **under both negligence and strict liability theories. Under either theory, a plaintiff must establish causation.** *Stark v. Armstrong World Indus., Inc.*, 21 Fed.Appx. 371, 375 (6th Cir. 2001). **We have required that a plaintiff show**, for each defendant, that (1) he was **exposed to the *defendant's* product**, and (2) the product was a substantial factor in causing the injury he suffered. *Id.*

424 F.3d at 492 (emphasis added). Implicit in this rule is the holding that a product manufacturer has no duty to warn about hazards arising from another manufacturer's product (or component part). Accordingly, the MDL Court addressed negligence claims in *Conner* when it declared, "this Court adopts *Lindstrom* and now holds that, under maritime law, a manufacturer is not liable for harm caused by, **and owes no duty to warn of the hazards inherent in, asbestos products that the manufacturer did not manufacture or distribute.**" 842 F.Supp.2d at 801 (emphasis added).

"product" (as defined by *Lindstrom*).[12] To state this differently, *Lindstrom* holds that, under maritime law, a plaintiff must show evidence of (sufficient) exposure to asbestos from a defendant's own "product" in order to hold a product manufacturer liable under any theory of liability (whether strict liability or negligence).

It follows then that, under maritime law (unlike, for example, Pennsylvania law, as recently predicted by this MDL Court in *Schwartz v. Abex Corp.*, 106 F.Supp.3d 626 (E.D.Pa.2015) (Robreno, J.)[13]), it is not necessary to analyze the two types of claims separately, as maritime law's definition of a "product" for which a defendant can be liable (under either theory of liability[14]) renders the defense equally and

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[12] The definition of "product" utilized by maritime law, as set forth in *Lindstrom*, can be inferred from that court's discussion and handling of the claims brought against defendants Coffin and Ingersoll Rand. (*See* footnotes 8 and 9 herein.) Under maritime law, a defendant's "product" is one that it has manufactured or supplied. This includes *original* component parts (i.e., component parts supplied by the defendant in/with the product), but does *not* include external insulation or *replacement* components parts that were neither manufactured nor supplied by the defendant.

[13] This MDL Court's prediction of Pennsylvania law, as set forth at length in *Schwartz*, was driven in large part by "the recent Pennsylvania Supreme Court decision in *Tincher*, which pronounces the availability of negligence causes of action (in addition to strict liability causes of action) against product manufacturers," 106 F.Supp.3d at 652, and, unlike the maritime law rule of *Lindstrom*, does not explicitly premise a negligence cause of action upon a showing of asbestos exposure arising from the defendant's own "product."

[14] With respect to a negligence theory of liability: under maritime law, a product manufacturer defendant has no duty to

indistinguishably applicable to both types of claims. For this reason, this Court's decisions on Defendants' summary judgment motions did not analyze Plaintiff's negligence and strict liability claims separately. Instead, upon concluding that there was no evidence of exposure to asbestos from a given defendant's "product(s)," simultaneously and uniformly applied the "bare metal defense" to all claims against it.

In short, to be clear, *Conner* (the governing rule applied in the present case brought by the DeVries Plaintiffs) holds that, under maritime law (as set forth by *Lindstrom* and adopted by *Conner*), the so-called "defense" applies to both negligence and strict product liability claims (as asserted against a product manufacturer defendant[15]) and bars both types of

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warn about asbestos hazards arising from another manufacturer's product (or component part)—thus no negligence cause of action (for failure to warn) can be brought against a product manufacturer defendant for harm arising from exposure to another manufacturer's product (or component part). With respect to a strict product liability theory of liability: a product manufacturer cannot be strictly liable for a product (or component part) that is not its own product (i.e., over which it had no control). *See Conner*, 842 F.Supp.2d at 801 (citing *Lindstrom*).

[15] To the extent that a defendant in asbestos litigation has a status other than—or in addition to—that of "product manufacturer" (e.g., shipowner, shipbuilder, employer, etc.), the "bare metal defense" and analysis of the "bare metal" issue are, generally, inapplicable; and a separate and distinct analysis of liability (under the concept of general common law negligence and/or other statutes, such as the Jones Act) is likely warranted and appropriate. *See, e.g., Mack v. General Electric Co.*, 896 F.Supp.2d 333, 346 (E.D.Pa. 2012) (Robreno, J.) (holding that, under maritime law, a Navy ship is not a "product" for purposes of strict product liability law), and *Filer v. Foster Wheeler LLC*,

claims where there is no evidence (or insufficient evidence) of exposure to asbestos from the defendant's "product."

III. Maritime Law Versus State Law: Differing Applications of the "Bare Metal Defense"

Maritime law (as set forth in *Lindstrom*) has established a bright-line rule regarding the "product(s)" for which a product manufacturer can be liable. This rule requires that a plaintiff establish (sufficient) exposure to asbestos from the defendant's own "product" in order to maintain either a negligence or strict liability claim (thus holding (implicitly) that a product manufacturer defendant has no duty to warn about any product that is not its own "product").[16] None of the circumstances or exceptions identified in the February 5th Order (and its citation to numerous decisions from other courts) impacts the analysis of Plaintiffs' maritime law claims against the present appealing Defendants (all of whom are product manufacturer defendants).[17] This is because, with one

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994 F.Supp.2d 679, 687–95 (E.D.Pa.2012) (Robreno, J.) (holding that, under maritime law, the builder of a Navy ship owes a common law duty to exercise reasonable care under the circumstances, in issuing warnings to Navy seaman (and others) of the hazards of asbestos present aboard the Navy ships they build).

[16] *See* footnotes 11 and 12 herein.

[17] The Court notes that the four (4) circumstances outlined by the February 5th Order comprise an effort of the various courts to distill into a rule of law (for application in the context of an asbestos action) the "knew or should have known" requirement that *generally* exists for a common law negligence cause of action (and, in particular, a negligent failure-to-warn claim) brought

exception, the cases cited by the February 5th Order all involved application of a given state's law, rather than maritime law. *See Surre v. Foster Wheeler LLC*, 831 F.Supp.2d 797 (S.D.N.Y.2011) (New York law); *O'Neil*, 53 Cal.4th 335, 135 Cal. Rptr.3d 288, 266 P.3d 987 (California law); *May v. Air & Liquid Sys. Corp.*, 446 Md. 1, 129 A.3d 984 (Md.2015) (Maryland law); *Sparkman v. Goulds Pumps, Inc.*, No. 12–02957, 2015 WL 727937 (D.S.C. Feb. 19, 2015) (South Carolina law); *In re New York City Asbestos Litig.*, 121 A.D.3d 230, 990 N.Y.S.2d 174 (2014) (New York law); *Braaten*, 165 Wash.2d 373, 198 P.3d 493 (Washington law);

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against a product manufacturer in a product liability action (and, specifically, the element of "duty" that a plaintiff contends has been breached). *See* 57A Am. Jur. 2d Negligence §§ 357, 359 ("Duty to Warn. Generally" (§ 357) ("A person who controls an instrumentality or agency that he or she knows or should know to be dangerous and which creates a foreseeable peril to others has, if the danger is not obvious and apparent, a duty to give warning of the danger"); "Duty to Warn. Foreseeability" (§ 359) ("If a product has dangerous propensities, a duty to warn generally arises where there is unequal knowledge, either actual or constructive, with respect to the risk of harm, and the defendant, possessed of such knowledge, knows or should know that harm might occur absent a warning.")).

Importantly, however, none of the rules/circumstances identified by the February 5th Order impacts the viability of a negligent failure-to-warn claim brought under *maritime* law, because of the fact that, under *maritime* law, an asbestos product manufacturer defendant (1) has no "duty" to warn about a "product" that it did not manufacture or supply (and has a "duty" to warn only about "products" it manufactured or supplied), and, in keeping with this delineation of "duty," (2) can only be liable in negligence if there is evidence of (a sufficient amount of) exposure to asbestos from a "product" it manufactured or supplied, in part because the "causation" element is not satisfied. *See Lindstrom*, 424 F.3d at 492, 496–97.

Schwartz, 106 F.Supp.3d 626 (Pennsylvania law); Macias, 175 Wash.2d 402, 282 P.3d 1069 (Washington law). The rule of law set forth in each of these cases reflects a policy determination of that particular state—a policy determination which need not be consistent with the policy determination underlying maritime law.[18] *See East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864–66, 106 S.Ct. 2295, 90 L.Ed.2d 865 (1986) (absent a controlling statute, maritime law is "developed by the judiciary" and reflects, *inter alia*, "public policy judgment[s]"); *Mack v. General Electric Co.*, 896 F.Supp.2d 333, 338 (E.D.Pa.2012) (Robreno, J.) (discussing policy

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[18] As explained by this Court in *Schwartz*, "whether or not a given . . . law recognizes the so-called 'bare metal defense' . . . is a matter determined largely by how that [jurisdiction] defines the 'product' at issue. As such, the determination is largely a matter of policy." 106 F.Supp.3d at 635–37.

Moreover, maritime law is concerned with promoting uniformity in the law of the sea. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) (discussing *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970)); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1462 (6th Cir. 1993). The interests of maritime law are separate and different from those of land-based law. *See e.g., Mack v. General Electric Co.*, 896 F.Supp.2d 333, 338 (E.D.Pa.2012) (Robreno, J.); *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 25–19, 125 S.Ct. 385, 394–96, 160 L.Ed.2d 283 (2004); *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F.Supp. 186, 201–03 (S.D.Fla.1981). As such, it need not—and likely should not—conform to states' policy determinations where doing so would create inconsistencies within maritime law (such as, for example, inconsistencies across the Third and Sixth Circuits in the application of maritime law in—and accompanying resolution of—virtually identical asbestos cases).

considerations unique to maritime law); *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 25–19, 125 S.Ct. 385, 394–96, 160 L.Ed.2d 283 (2004) (same); *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 525 F.Supp. 186, 201–03 (S.D.Fla.1981) (same).

The sole maritime law case cited by the February 5th Order is *Quirin v. Lorillard Tobacco Co.*, 17 F.Supp.3d 760 (N.D.Ill. 2014), which was decided two years after this MDL Court's decision in *Conner*. The Court has reviewed Judge Gottschall's thorough and well-reasoned decision in *Quirin* and has identified the source of divergence between the *Conner* and *Quirin* decisions: *Quirin* is premised on Judge Gottschall's construction of the *Lindstrom* decision as one that "did not discuss a failure to warn claim," 17 F.Supp.3d at 768, leading Judge Gottschall to proceed with setting forth maritime law as to such a claim, while *Conner* has construed *Lindstrom* as already encompassing the rule of law on negligent failure-to-warn claims (as well as strict liability defective design/warning claims)—a rule consistent with those set forth regarding state law in *O'Neil*, *Simonetta*, and *Braaten*—decisions which each considered and relied upon *Lindstrom* in determining its respective rule of law regarding negligent failure-to-warn.[19]

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[19] Specifically, in *Conner*, this MDL Court explained that, in addition to strict liability for defective design/warning, "a manufacturer is also liable for the harm resulting from the **negligent failure to warn** of the risks created by ***its*** products." 842 F.Supp.2d at 797 (emphasis added). It relied on *Lindstrom* in setting forth the applicable rule of law:

> "In determining whether Defendant manufacturers are liable under maritime law for

> injuries caused by asbestos parts used with their products, **whether in strict liability or negligence, a plaintiff must establish causation with respect to each defendant manufacturer.** *See Lindstrom v. A–C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir.2005). **A plaintiff establishes causation under maritime law by showing** (1) that the plaintiff **was exposed to the defendant's product** and (2) that the product was a substantial factor in causing the plaintiff's injury. ***See id.***"

Id. (emphasis added). It concluded that this construction was accurate, in part, because of the decisions in ***O'Neil, Simonetta, and Braaten***, each of which considered ***Lindstrom*** as instructive and persuasive precedent regarding a negligent failure-to-warn claim. A summary of the relevant aspect of each of those three cases is as follows:

After considering *Lindstrom*, *O'Neil* found that there is "no duty to warn of defects in another manufacturer's product" and "no duty of care to prevent injuries from another manufacturer's product," because "[t]he same policy considerations that militate against imposing strict liability in this situation apply with equal force in the context of negligence." 135 Cal.Rptr.3d 288, 266 P.3d at 997, 1006–07.

The *Simonetta* court found *Lindstrom* to be the precedent most factually similar to the case before it, and held that, "[b]ecause [evaporator manufacturer defendant] Viad was not in the chain of distribution of the dangerous product [i.e., asbestos-containing insulation used with the evaporator], we conclude not only that it had no duty to warn under negligence, but also that it cannot be strictly liable for failure to warn." 197 P.3d at 138.

Extending the holding of *Simonetta* to replacement parts, the Supreme Court of Washington noted in *Braaten* that *Lindstrom* was "particularly instructive," and held that a valve manufacturer defendant (Henry Vogt) had "no duty under common law products liability or negligence principles to warn of the dangers of exposure to asbestos in products it did not manufacture and for which the manufacturer was not in the chain of distribution. These holdings apply here and **foreclose**

In short, the rules of law surrounding the circumstances identified by the February 5th Order are creatures of state law—and determinations of state policy—that are not applicable under maritime law (as construed by this MDL Court to have been set forth in *Lindstrom* and *Stark*).

IV. Summary and Conclusion

In adopting the so-called "bare metal defense" under maritime law (as set forth in *Lindstrom*) and applying it to subsequent MDL cases (including the present case), this MDL Court (1) has considered plaintiffs' negligent failure-to-warn claims, (2) has determined that, when applicable, the defense (as set forth by *Lindstrom*) bars both strict liability and negligent failure-to-warn claims, and (3) has concluded that maritime law's application of the defense (as illustrated by *Lindstrom*) rejects potential liability of a product manufacturer in negligence for products (or component parts) that it did not manufacture or supply (i.e., rejects separate and different analyses of negligence liability and strict liability).

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the plaintiff's products liability and **negligence claims based on failure to warn of the danger of exposure to asbestos** (1) in insulation applied to pumps and valves the defendant-manufacturers sold to the navy, where the manufacturers did not manufacture or sell the insulation and were not in the chain of distribution of it and (2) **in replacement packing and gaskets installed in or connected to the pumps and valves after they were installed aboard ships, where the manufacturers did not manufacture or sell the replacement packing and gaskets and were not in the chain of distribution of these products.**" 198 P.3d at 504 (emphasis added).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-2667

IN RE: ASBESTOS PRODUCTS LIABILITY
LITIGATION (NO. VI)

Shirley McAfee, individually and as
Executrix of the Estate of Kenneth McAfee,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
PENNSYLVANIA
(D.C. No. 5-13-cv-06856)
District Judge: Hon. Gerald J. Pappert

Submitted: May 11, 2016

Before: VANASKIE, SHWARTZ, and RESTREPO, Circuit Judges.

ORDER

Kenneth McAfee ("Mr. McAfee") and Shirley McAfee brought strict products liability and negligence claims against a group of manufacturers including Ingersoll-Rand & Company, ("Ingersoll"), alleging that Mr. McAfee contracted lung cancer in part due to his contact with asbestos-containing products used with Ingersoll compressors aboard United States Navy ships. Because Mr. McAfee's exposure to asbestos occurred while aboard Navy vessels on navigable waters, his claims are governed by maritime law.

The District Court granted Ingersoll's motion for summary judgment. It applied the so-called "bare metal defense," under which a manufacturer cannot be held liable for injuries attributable to a product that it did not manufacture or distribute, App. 11, 14, and concluded that the evidence did not show that McAfee was exposed to asbestos products manufactured or sold by Ingersoll and hence could not prove that Ingersoll's products caused his injury. App. 14 (noting that while "[t]here is evidence that [Mr. McAfee] was exposed to respirable dust from asbestos-containing gaskets, packing, and insulation used in connection with various Ingersoll compressors . . . [and] that Ingersoll anticipated (and perhaps even recommended) use of [such] asbestos-containing [parts] . . . there is no evidence that Mr. McAfee was

exposed to [asbestos from parts actually] supplied by Ingersoll").

In reaching its decisions, the District Court relied upon *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791 (E.D. Pa. 2012), in which the District Court surveyed various cases as well as the Restatement (Second) of Torts § 402A (1965), which sets forth a theory of strict liability. *See also Schwartz v. Abex Corp.*, 106 F. Supp. 3d 626, 634-35 (E.D. Pa. 2015); *Simonetta v. Viad Corp.*, 197 P.3d 127, 134 (Wash. 2008). While *Conner* appears to hold that the bare metal defense applies to both strict liability and negligence claims, *see Connor*, 842 F. Supp. 2d at 802,[1] the opinion in this case contains no specific reference to negligence. Therefore, we are unable to determine whether the District Court considered the negligence claim or if it meant to apply the bare metal defense to it.

We also note that several maritime and state law cases examining the bare metal defense have mentioned circumstances under which a manufacturer could potentially be liable for asbestos parts that it did not supply. The District Judge is

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[1] In *Conner*, the District Court held that

> under maritime law, a manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in asbestos products that the manufacturer did not manufacture or distribute. This principle is consistent with the development of products liability law based on strict liability and negligence . . . . A plaintiff's burden to prove a defendant's product caused harm remains the same in cases involving third-party asbestos manufacturers as it would in other products-liability cases based on strict liability and negligence.

Connor, 842 F. Supp. 2d at 802.

familiar with these cases and has ably examined them. *See Schwartz*, 106 F. Supp. 3d at 644-48. Those circumstances include when: (1) the defendant's product requires asbestos components to function, *see Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 769-70 (N.D. Ill. 2014); *Surre v. Foster Wheeler LLC*, 831 F. Supp. 2d 797, 801-02 (S.D.N.Y. 2011); *O'Neil v. Crane Co.*, 266 P.3d 987, 996 (Cal. 2012); *May v. Air & Liquid Sys. Corp.*, 129 A.3d 984, 990-92 (Md. 2015); (2) the defendant affirmatively specifies that asbestos components and replacement parts be used, *see Sparkman v. Goulds Pumps, Inc.*, Civ. No. 2:12-cv-02957, 2015 WL 727937, at *2-3 (D.S.C. Feb. 19, 2015); *Quirin*, 17 F. Supp. 3d at 769-70; *O'Neil*, 266 P.3d at 996; *In re N.Y.C. Asbestos Litig.*, 990 N.Y.S.2d 174, 189-90 (N.Y. App. Div. 2014); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 495-96 (Wash. 2008); (3) the defendant "knew" that the customer would use asbestos parts with its product, *see Schwartz*, 106 F. Supp. 3d at 654-55; *Surre*, 831 F. Supp. 2d at 801; *In re N.Y.C. Asbestos*, 990 N.Y.S.2d at 196, or (4) the defendant intended that the product be used with asbestos, *see Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069, 1077 n.4 (Wash. 2012).[2]

Because of the District Judge's wealth of experience with these types of cases, and because we are unable to determine whether the District Court: (1) considered the negligence theory, (2) concluded that the bare metal defense applies to it and why, or (3) considered whether the circumstances listed in the cases cited herein should apply to a negligence claim

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[2] We offer no opinion at this time whether such circumstances provide a basis for liability in this or any case.

brought under maritime law (and if not, why not, and if so, why and whether the record here would support such a claim), and upon consideration of the arguments by counsel presented in their briefs, it is hereby ordered that the case is summarily remanded to the District Court to consider these items.

In the event that a subsequent appeal is taken after the proceedings on remand have concluded, any future appeal will be considered by this panel after completion of briefing.

By the Court,

s/Patty Shwartz

Circuit Judge

Dated: May 12, 2016

PDB/cc: All Counsel of Record

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15-1278

IN RE: ASBESTOS PRODUCTS LIABILITY
LITIGATION (NO. VI)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF PENNSYLVANIA
(D.C. Nos. 5-13-cv-00474 & 2-01-md-00875)
District Judge: Hon. Eduardo C. Robreno

Argued: January 29, 2016

Before: VANASKIE, SHWARTZ, and RESTREPO,
Circuit Judges.

ORDER

John B. and Roberta G. DeVries brought strict products liability and negligence claims against various manufacturers, including Air & Liquid Systems Corp., IMO Industries, Inc., Warren Pumps, CBS Corporation, Foster Wheeler LLC, and General Electric Company (together, "Defendants"), based upon the theory that Defendants failed to warn Mr. DeVries of the dangers of handling the asbestos insulation and parts used in conjunction with their products, which contributed to his development of lung cancer. Because Mr. DeVries's exposure to asbestos occurred while at sea on board a Navy vessel, the claims are governed by maritime law.

The District Court granted Defendants' motions for summary judgment. It applied the so-called "bare metal defense," under which a manufacturer cannot be held liable for injuries attributable to a product that it did not manufacture or distribute, App. 9, 17, 25, 33, 41, 49, and concluded that the evidence did not show that Mr. DeVries was exposed to asbestos products manufactured or sold by Defendants and hence could not prove that they caused his injury. **App. 12, 20, 29, 36-37, 44-45, 52-53.**

In reaching its decisions, the District Court relied upon *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791 (E.D. Pa. 2012), in which the District Court surveyed various cases as well as the Restatement (Second) of Torts § 402A (1965), which sets forth a theory of strict liability. *See, e.g.*, *Schwartz v. Abex Corp.*, 106 F.

Supp. 3d 626, 634-35 (E.D. Pa. 2015); *Simonetta v. Viad Corp.*, 197 P.3d 127, 134 (Wash. 2008). While *Conner* appears to hold that the bare metal defense applies to both strict liability and negligence claims, 842 F. Supp. 2d at 802,[1] the opinions in this case contain no specific reference to negligence. Therefore, we are unable to determine whether the District Court considered the negligence claim or if it meant to apply the bare metal defense to it.

We also note that several maritime and state law cases examining the bare metal defense have mentioned circumstances under which a manufacturer could potentially be liable for asbestos parts that it did not supply. The District Judge is familiar with these cases and has ably examined them. *See Schwartz*, 106 F. Supp. 3d at 644-49. Those circumstances include when: (1) the defendant's product requires asbestos components to function, *see Quirin v. Lorillard Tobacco Co.*, 17 F. Supp. 3d 760, 769-70 (N.D. Ill. 2014); *Surre v. Foster Wheeler LLC*, 831 F. Supp. 2d 797, 801-02 (S.D.N.Y. 2011); *O'Neil v. Crane Co.*, 266 P.3d 987, 996 (Cal. 2012); *May v. Air &*

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[1] In *Conner*, the District Court held that

> under maritime law, a manufacturer is not liable for harm caused by, and owes no duty to warn of the hazards inherent in asbestos products that the manufacturer did not manufacture or distribute. This principle is consistent with the development of products liability law based on strict liability and negligence . . . . A plaintiff's burden to prove the defendant's product caused harm remains the same in cases involving third-party asbestos manufacturers as it would in other products liability cases based on strict liability and negligence.

842 F. Supp. 2d at 802.

Liquid Sys. Corp., — A.3d —, 2015 WL 9263907, at *9 (Md. Dec. 18, 2015); (2) the defendant affirmatively specifies that asbestos components and replacement parts be used, *see Sparkman v. Goulds Pumps, Inc.*, Civ. No. 2:12-cv-02957, 2015 WL 727937, at *2 (D.S.C. Feb. 19, 2015); *Quirin*, 17 F. Supp. 3d at 769-70; *O'Neil*, 266 P.3d at 996; *In re New York City Asbestos Litig.*, 990 N.Y.S.2d 174, 190 (N.Y. App. Div. 2014); *Braaten v. Saberhagen Holdings*, 198 P.3d 493, 495-96 (Wash. 2008); (3) the defendant "knew" that the customer would use asbestos parts with its product, *see Schwartz*, 106 F. Supp. 3d at 654-55; *Surre*, 831 F. Supp. 2d at 801; *In re New York City Asbestos*, 121 A.D. 3d at 259; or (4) the defendant intended that the product be used with asbestos, *Macias v. Saberhagen Holdings, Inc.*, 282 P.3d 1069, 1077 n.4 (Wash. 2012).[2]

Because of the District Judge's wealth of experience with these types of cases, and because we are unable to determine whether the District Court: (1) considered the negligence theory, (2) concluded that the bare metal defense applies to it and why, or (3) considered whether the circumstances listed in the cases cited herein should apply to a negligence claim brought under maritime law (and if not, why not, and if so, why and whether the record here would support such a claim), and upon consideration of the arguments by counsel presented in their briefs and at oral argument, it is hereby ordered that the case is summarily remanded to the District Court to consider these items.

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[2] We offer no opinion at this time whether such circumstances provide a basis for liability in this or any case.

In the event that a subsequent appeal is taken after the proceedings on remand have concluded, any future appeal will be considered by this panel after completion of briefing.

By the Court,

s/ Patty Shwartz
Circuit Judge

DATED: February 5, 2016
ARR/cc: All Counsel of Record

OFFICE OF THE CLERK

MARCIA M. WALDRON
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA
19106-1790
Website:
www.ca3.uscourts.gov

TELEPHONE
215-597-2995

February 5, 2016

ENTRY OF JUDGMENT

Today, **February 05, 2016** the Court issued a case dispositive order in the above-captioned matter which serves as this Court's judgment. Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment
45 days after entry of judgment in a civil case if the United States is a party

Page Limits:
15 pages

Attachments:
A copy of the panel's dispositive order only. No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. If separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to a combined 15 page limit. If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,

s/Marcia M. Waldron

Marcia M. Waldron, Clerk

By: */s/ Aina*, Case Manager

Direct Dial: 267-299-4957

APPENDIX F

United States District Court,
E.D. Pennsylvania.

Kenneth E. McAfee, et al., Plaintiffs,
v.
20th Century Glove Corp.
of Texas, et al., Defendants.

CONSOLIDATED UNDER MDL 875
|
E.D. PA Civil Action No. 5:13–06856–ER
|
Filed 10/23/2014

ORDER

EDUARDO C. ROBRENO, District Judge.

AND NOW, this **22nd** day of **October, 2014,** it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Ingersoll-Rand & Co. (Doc. No. 171) is **GRANTED**.[1]

[1] This case was removed in November of 2013 from the Court of Common Pleas of Philadelphia to the United States District

Court for the Eastern District of Pennsylvania as part of MDL-875.

Plaintiff alleges that he was exposed to asbestos while serving in the U.S. Navy during the time period 1969 to 1991 and while working in the Philadelphia Naval Shipyard during the years 1991 to 1993. Defendant Ingersoll-Rand & Co. ("Ingersoll" or "Ingersoll-Rand") manufactured compressors used aboard ships. The alleged asbestos exposure pertinent to Defendant occurred, *inter alia*, while Plaintiff was aboard:

- *USS Wanamassa*
- *USS Commodore*

Plaintiff asserts that he developed lung cancer as a result of his exposure to Defendant's asbestos-containing products.

Plaintiff brought claims against various defendants. Defendant Ingersoll has moved for summary judgment, arguing that (1) there is insufficient evidence to establish causation with respect to its product(s), and (2) it is entitled to summary judgment on grounds of the bare metal defense.

Defendant asserts that maritime law applies, while Plaintiff contends that Pennsylvania law applies.

II. Legal Standard

A. *Summary Judgment Standard*

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir. 2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a

genuine issue of material fact if a reasonable jury could find for the nonmoving party." *Pignataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 268 (3d Cir. 2010) (citing *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir. 1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

B. *The Applicable Law*

Defendant asserts that maritime law applies. Plaintiff contends that Pennsylvania law applies because (1) some of the alleged exposure occurred at a shipyard and is therefore land-based, and (2) the products at issue were designed on land in Pennsylvania. Whether maritime law is applicable is a threshold dispute that is a question of federal law, *see* U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. *See Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F. Supp. 2d 358, 362 (E.D. Pa. 2009)(Robreno, J.). This court has previously set forth guidance on this issue. *See Conner v. Alfa Laval, Inc.*, 799 F. Supp. 2d 455 (E.D. Pa. 2011)(Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. *Id.* at 463-66 (discussing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. *Id.* In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. *See Sisson v. Ruby*, 497 U.S. 358 (1990). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." *See Deuber v. Asbestos Corp. Ltd.*, No. 10-78931, 2011 WL 6415339, at *1 n.1 (E.D. Pa. Dec. 2, 2011)(Robreno, J.)(applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard,

for example, as was the case with the Willis plaintiff discussed in *Conner*) is land-based work. The connection test requires that the incident could have " 'a potentially disruptive impact on maritime commerce,' " and that " 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.' " *Grubart*, 513 U.S. at 534 (citing *Sisson*, 497 U.S. at 364, 365, and n.2).

Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a ship docked at the shipyard, and includes those in "dry dock"), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." *Conner*, 799 F. Supp. 2d at 466; *Deuber*, 2011 WL 6415339, at *1 n.1. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will almost always meet the connection test necessary for the application of maritime law. *Conner*, 799 F. Supp. 2d at 467-69 (citing *Grubart*, 513 U.S. at 534). This is particularly true in cases in which the exposure has arisen as a result of work aboard Navy vessels, either by Navy personnel or shipyard workers. *See id.* But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. *Id.*

The alleged exposures pertinent to Defendant occurred aboard ships—some of which were in "dry dock" a the shipyard. Therefore, these exposures were during sea-based work. *See Conner*, 799 F. Supp. 2d 455; Deuber, 2011 WL 6415339, at *1 n.1. Accordingly, maritime law is applicable to Plaintiff's claims against Defendant. *See id.* at 462-63.

C. *Bare Metal Defense Under Maritime Law*

This Court has held that the so-called "bare metal defense" is recognized by maritime law, such that a manufacturer has no liability for harms caused by—and no duty to warn about hazards associated with—a product it did not manufacture or distribute. *Conner v. Alfa Laval, Inc.*, 842 F. Supp. 2d 791, 801 (E.D. Pa. 2012)(Robreno, J.).

D. *Product Identification/Causation Under Maritime Law*

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." *Lindstrom v. A-C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir. 2005); citing *Stark v. Armstrong World Indus., Inc.*, 21 Fed.Appx. 371, 375 (6th Cir. 2001). This Court has also noted that, in light of its holding in *Conner*, 842 F. Supp. 2d 791, there is also a requirement (implicit in the test set forth in *Lindstrom* and *Stark*) that a plaintiff show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. *Abbay v. Armstrong Int'l., Inc.*, No. 10-83248, 2012 WL 975837, at *1 n.1 (E.D. Pa. Feb. 29, 2012)(Robreno, J.).

Substantial factor causation is determined with respect to each defendant separately. *Stark*, 21 Fed.Appx. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. *Id.* at 376 (quoting *Harbour v. Armstrong World Indus., Inc.*, No. 90-1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. *Lindstrom*, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." *Id.* Rather, the plaintiff must show " 'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.' " *Id.* (quoting *Harbour*, 1991 WL 65201, at *4). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. *Redland Soccer Club, Inc. v. Dep't of Army of*

U.S., 55 F.3d 827, 851 (3d Cir. 1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." ***Stark***, 21 Fed.Appx. at 376 (citing ***Matthews v. Hyster Co., Inc.***, 854 F.2d 1166, 1168 (9th Cir. 1988)(citing Restatement (Second) of Torts, § 402A (1965))).

III. Defendant Ingersoll Rand's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Defendant contends that Plaintiffs' evidence is insufficient to establish that any product for which it is responsible caused the illness at issue.

Bare Metal Defense

Defendant argues that it has no duty to warn about and cannot be liable for injury arising from any product or component part that it did not manufacture or supply.

B. Plaintiff's Arguments

Product Identification / Causation / Bare Metal Defense

Plaintiffs contend that they have identified sufficient product identification/causation evidence to survive summary judgment. In support of this assertion, Plaintiffs cite to the following evidence, which is summarized in pertinent part as follows:

- ***Depositions of Plaintiff Kenneth McAfee*** Plaintiff testified that he was exposed to respirable dust from asbestos-containing gaskets, packing, and insulation used in connection with Ingersoll compressors aboard various ships.

  (Pl. Exs. A and B, Doc. No. 203.)

- ***Discovery Responses of Defendant*** Plaintiffs point to discovery responses of Defendant to support their contentions that (1) Defendant admits that its compressors were designed and intended to contain asbestos, and that (2) Defendant required asbestos on high temperature gaskets on its compressors and pumps.

  (Pl. Exs. D and E, Doc. No. 203-1)

• *Expert Affidavit of Arthur Faherty* Plaintiffs point to the affidavit of expert Arthur Faherty, who provides testimony that (1) "Generally, if a company supplied asbestos with its equipment, some of that asbestos was always present unless the record shows that the asbestos installed by the defendant was entirely, removed," and (2) "The removal of the entire initial asbestos never occurred."

(Pl. Ex. C, Doc. No. 203)

• *Expert Affidavit of Dr. Arthur Frank* Plaintiffs point to the affidavit of expert Arthur Frank, who they contend will provide testimony that Defendant knew or could or should have known of the hazards of asbestos at the relevant times.

(Pl. Ex. F, Doc. No. 203-2)

With respect to the so-called "bare metal defense," Plaintiffs contend that maritime law does not or should not recognize the defense because it violates the "fundamental principle of federal maritime law that federal courts must take special care to protect seamen." (Pl. Opp. at 4.)

C. Analysis

Plaintiffs allege that Mr. McAfee was exposed to asbestos from gaskets, packing and insulation used in connection with Ingersoll compressors. There is evidence that he was exposed to respirable dust from asbestos-containing gaskets, packing, and insulation used in connection with various Ingersoll compressors. There is evidence that Ingersoll anticipated (and perhaps even recommended) use of asbestos-containing gaskets, packing, and insulation with these compressors.

Importantly, however, there is no evidence that Mr. McAfee was exposed to respirable asbestos dust from gaskets, packing, or insulation supplied by Ingersoll (either as an original part or a replacement part). Although Plaintiffs point to expert evidence to support their contention that some of the original asbestos material supplied by Ingersoll was still present on the ship at the time of Mr. McAfee's alleged exposure, this evidence is not only impermissibly speculative, but fails to establish that Mr. McAfee was exposed to any such asbestos still present on the ship (as opposed to other asbestos supplied by other companies). As such, no reasonable jury could conclude from the evidence that Mr.

AND IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 12601085

McAfee was exposed to asbestos from a product manufactured or supplied by Defendant Ingersoll such that it was a substantial factor in the development of his illness, because any such finding would be based on conjecture. *See Lindstrom*, 424 F.3d at 492. Accordingly, summary judgment in favor of Defendant is warranted. *Anderson*, 477 U.S. at 248-50.

D. Conclusion

Summary judgment in favor of Defendant is granted with respect to all of Plaintiff's claims against it because Plaintiff has failed to identify sufficient evidence of product identification/causation.

APPENDIX G

United States District Court,
E.D. Pennsylvania.

John B. DEVRIES, et al., Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al., Defendants.

MDL No. 875.
|
E.D. PA Civil Action No. 5:13–00474–ER.
|
Signed Oct. 10, 2014.

ORDER

EDUARDO C. ROBRENO, District Judge.

AND NOW, this **10th** day of **October, 2014,** it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant CBS Corporation (Doc. No. 269) is **GRANTED**.[1]

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[1] This case was removed in January of 2013 from the Court of Common Pleas of Philadelphia to the United States District Court for the Eastern District of Pennsylvania as part of MDL–875.

Plaintiff alleges that he was exposed to asbestos while serving in the U.S. Navy during the time period 1957 to 1960. Plaintiff alleges that Defendant CBS Corporation, a successor to

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Westinghouse and perhaps other entities ("CBS") manufactured turbines, blowers, and generators used aboard ships. The alleged asbestos exposure pertinent to Defendant CBS occurred while Plaintiff was aboard the following ship:

•*USS Turner*

Plaintiff asserts that he developed an asbestos- related illness as a result of his exposure to Defendant's products.

Plaintiff brought claims against various defendants. Defendant CBS has moved for summary judgment, arguing that (1) there is insufficient evidence to establish causation with respect to its product(s), (2) it is entitled to summary judgment on grounds of the bare metal defense, and (3) it is immune from liability by way of the government contractor defense.

The parties assert that maritime law applies.

II. Legal Standard

A. *Summary Judgment Standard*

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir.2009) (quoting *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247–248 (1986)). A fact is "material" if proof of its existence or non- existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." *Picrnataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 268 (3d Cir.2010) (citing *Reliance Ins. Co. v. Moessner*, 121 F.3d 895, 900 (3d Cir.1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden

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to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

B. *The Applicable Law*

1. Government Contractor Defense (Federal Law)

Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. *Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F.Supp.2d 358, 362–63 (E.D.Pa.2009) (Robreno, J.).

2. State Law Issues (Maritime versus State Law)

The parties assert that maritime law applies. Whether maritime law is applicable is a threshold dispute that is a question of federal law, see U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. *See Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F.Supp.2d 358, 362 (E.D.Pa .2009) (Robreno, J.). This court has previously set forth guidance on this issue. *See Conner v. Alfa Laval, Inc.*, 799 F.Supp.2d 455 (E.D.Pa.2011) (Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. *Id.* at 463–66 (discussing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. *Id.* In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. *See Sisson v. Ruby*, 497 U.S. 358 (1990). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." *See Deuber v. Asbestos Corp. Ltd.*, No. 10–78931, 2011 WL 6415339, at *1 n. 1 (E.D.Pa. Dec. 2, 2011) (Robreno, J.) (applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a

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dock, (such as work performed at a machine shop in the shipyard, for example, as was the case with the Willis plaintiff discussed in *Conner*) is land-based work. The connection test requires that the incident could have " 'a potentially disruptive impact on maritime commerce,' " and that " 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.' " *Grubart*, 513 U.S. at 534 (citing *Sisson*, 497 U.S. at 364, 365, and n. 2).

> *Locality Test*
>
> If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a ship docked at the shipyard, and includes those in "dry dock"), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." *Conner*, 799 F.Supp.2d at 466; Deuber, 2011 WL 6415339, at *1 n.l. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.
>
> *Connection Test*
>
> When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will almost always meet the connection test necessary for the application of maritime law. *Conner*, 799 F.Supp.2d at 467–69 (citing *Grubart*, 513 U.S. at 534). This is particularly true in cases in which the exposure has arisen as a result of work aboard Navy vessels, either by Navy personnel or shipyard workers. *See id.* But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. *Id.*

The alleged exposures pertinent to Defendant occurred aboard a ship. Therefore, these exposures were during sea-based work. *See Conner*, 799 F.Supp.2d 455; *Deuber*, 2011 WL 6415339, at *1 n. 1. Accordingly, maritime law is applicable to Plaintiff's claims against Defendant. *See id.* at 462– 63.

C. *Bare Metal Defense Under Maritime Law*

This Court has held that the so-called "bare metal defense" is recognized by maritime law, such that a manufacturer has no liability for harms caused by-and no duty to warn about hazards associated with-a product it did not manufacture or distribute. *Conner v. Alfa Laval, Inc.*, 842 F.Supp.2d 791, 801 (E.D.Pa.2012) (Robreno, J.).

D. *Product Identification/Causation Under Maritime Law*

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." *Lindstrom v. A–C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir.2005); citing *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 375 (6th Cir.2001). This Court has also noted that, in light of its holding in *Conner*, 842 F.Supp.2d 791, there is also a requirement (implicit in the test set forth in *Lindstrom* and *Stark*) that a plaintiff show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. *Abbay v. Armstrong Int'l., Inc.*, No. 10– 83248, 2012 WL 975837, at *1 n. 1 (E.D.Pa. Feb. 29, 2012) (Robreno, J.).

Substantial factor causation is determined with respect to each defendant separately. *Stark*, 21 F. App'x. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. *Id.* at 376 (quoting *Harbour v. Armstrong World Indus., Inc.*, No. 90–1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. *Lindstrom*, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." Id. Rather, the plaintiff must show " 'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.' " Id. (quoting *Harbour*, 1991 WL 65201, at *4). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. *Redland Soccer Club, Inc. v. Dep't of Army of*

U.S., 55 F.3d 827, 851 (3d Cir.1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." ***Stark***, 21 F. App'x at 376 (citing ***Matthews v. Hyster Co., Inc.***, 854 F.2d 1166, 1168 (9th Cir.1988) (citing Restatement (Second) of Torts, § 402A (1965))).

III. Defendant CBS's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Defendant contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused the illness at issue.

Bare Metal Defense

Defendant asserts that it has no duty to warn about and cannot be liable for injury arising from any product or component part that it did not manufacture or supply.

Government Contractor Defense

CBS asserts the government contractor defense, arguing that it is immune from liability in this case because the Navy exercised discretion and approved the warnings supplied by Defendant for the products at issue, Defendant provided warnings that conformed to the Navy's approved warnings, and the Navy knew about asbestos and its hazards.

B. Plaintiff's Arguments

Product Identification / Causation / Bare Metal Defense

Plaintiff contends that he has identified sufficient product identification/causation evidence to survive summary judgment. In support of this assertion, Plaintiff cites to the following evidence, which Plaintiff represents is as follows:

- ***Deposition of Plaintiff***

  Plaintiff testified that he worked aboard the USS Turner in the two engine and two fire rooms. He testified that there were Westinghouse turbines, blowers, and generators aboard the ship. He testified that he was exposed to respirable dust

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from external insulation during repair work done on turbines and blowers.

(Pl.Ex.A, Doc. No. 296.)

• *Various Documents*

Plaintiff points to various documents and testimony to establish the following: (1) Westinghouse required asbestos on its turbines and blowers, including those aboard the ship at issue, and (2) Westinghouse arranged for asbestos on its equipment.

(Pl. Exs. D to H, Doc. Nos. 296, 296–1, 296–2, and 296–3)

With respect to the so-called "bare metal defense," Plaintiff contends that, where a Defendant supplied a product with original asbestos-containing components parts (or accompanying external insulation), the burden is on Defendant to establish that all of this original asbestos was removed prior to Plaintiff's exposure to the product. According to Plaintiff, in the absence of such proof by Defendant, there is a fact question as to whether any of the original asbestos was still present at the time of his alleged exposure.

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because there are genuine issues of material fact regarding its availability to Defendant. Plaintiff cites to various military specifications, including, *inter alia*, MIL– M–15071, which, he argues, show that the Navy did not prohibit Defendant from providing warnings with its products and, instead, left the nature and provision of any such warnings for determination by Defendants.

C. Analysis

Plaintiff alleges that he was exposed to asbestos from repair work done on Westinghouse turbines and blowers. There is evidence that Plaintiff was exposed to respirable asbestos dust from external insulation used in connection with Westinghouse turbines and blowers. Importantly, however, there is no evidence that Westinghouse manufactured or supplied that insulation. The Court has reviewed the sole document (Exhibit E, Doc. No.

AND IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 6746795

296–3) on which Plaintiff relies for his contention that Westinghouse "arranged" for asbestos insulation on the equipment-and notes that it makes no mention of asbestos. Therefore, even assuming, as Plaintiff implies, that "arranging" for asbestos insulation is the same as "supplying" it (an issue this Court need not reach), Plaintiff's evidence fails to establish that Westinghouse arranged for asbestos insulation on the equipment at issue. As such, no reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from a product manufactured or supplied by Defendant such that it was a substantial factor in the development of his illness, because any such finding would be based on conjecture. *See Lindstrom*, 424 F.3d at 492. Accordingly, summary judgment in favor of Defendant is warranted. *Anderson*, 477 U.S. at 248–50.

In light of this determination, the Court need not reach Defendant's argument regarding the government contractor defense.

D. Conclusion

Summary judgment in favor of Defendant is granted with respect to all of Plaintiff's claims against it because Plaintiff has failed to identify sufficient evidence of product identification/ causation.

APPENDIX H

United States District Court,
E.D. Pennsylvania.

John B. DEVRIES, et al., Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al., Defendants.

MDL No. 875.

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E.D. PA Civil Action No. 5:13–00474–ER.

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Filed Oct. 10, 2014.

ORDER

EDUARDO C. ROBRENO, District Judge.

AND NOW, this **10th** day of **October, 2014,** it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Foster Wheeler LLC (Doc. No. 277) is **GRANTED.**[1]

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[1] This case was removed in January of 2013 from the Court of Common Pleas of Philadelphia to the United States District Court for the Eastern District of Pennsylvania as part of MDL875.

Plaintiff alleges that he was exposed to asbestos while serving in the U.S. Navy during the time period 1957 to 1960. Plaintiff alleges that Defendant Foster Wheeler LLC ("Foster Wheeler") manufactured condensers used aboard ships. The alleged asbestos exposure pertinent to Defendant Foster Wheeler occurred while Plaintiff was aboard the following ship:

USS Turner

Plaintiff asserts that he developed an asbestos-related illness as a result of his exposure to Defendant's products.

Plaintiff brought claims against various defendants. Defendant Foster Wheeler has moved for summary judgment, arguing that (1) there is insufficient evidence to establish causation with respect to its product(s), (2) it is entitled to summary judgment on grounds of the bare metal defense, and (3) it is immune from liability by way of the government contractor defense.

The parties assert that maritime law applies.

II. Legal Standard

A. Summary Judgment Standard

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." ***Am. Eagle Outfitters v. Lyle & Scott Ltd.***, 584 F.3d 575, 581 (3d Cir.2009) (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247–248 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Anderson***, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." ***Pignataro v. Port Auth. of N.Y. & N.J.***, 593 F.3d 265, 268 (3d Cir.2010) (citing ***Reliance Ins. Co. v. Moessner***, 121 F.3d 895, 900 (3d Cir.1997)). While the moving party bears

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the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

B. The Applicable Law

1. Government Contractor Defense (Federal Law) Defendant's motion for summary judgment on the basis of the government contractor defense is governed by federal law. In matters of federal law, the MDL transferee court applies the law of the circuit where it sits, which in this case is the law of the U.S. Court of Appeals for the Third Circuit. *Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F.Supp.2d 358, 362–63 (E.D.Pa.2009) (Robreno, J.).

2. State Law Issues (Maritime versus State Law) The parties assert that maritime law applies. Whether maritime law is applicable is a threshold dispute that is a question of federal law, *see* U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. *See Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F.Supp.2d 358, 362 (E.D.Pa.2009) (Robreno, J.). This court has previously set forth guidance on this issue. *See Conner v. Alfa Laval, Inc.*, 799 F.Supp.2d 455 (E.D.Pa.2011) (Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. *Id.* at 463–66 (discussing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. *Id.* In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. *See Sisson v. Ruby*, 497 U.S. 358 (1990). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." *See Deuber v. Asbestos Corp. Ltd.*, No. 10–78931, 2011 WL 6415339, at *1 n. 1 (E.D.Pa. Dec. 2, 2011) (Robreno, J.) (applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard,

for example, as was the case with the Willis plaintiff discussed in *Conner*) is land-based work. The connection test requires that the incident could have " 'a potentially disruptive impact on maritime commerce,' " and that " 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.' " *Grubart*, 513 U.S. at 534 (citing *Sisson*, 497 U.S. at 364, 365, and n. 2).

Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a ship docked at the shipyard, and includes those in "dry dock"), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." *Conner*, 799 F.Supp.2d at 466; *Deuber*, 2011 WL 6415339, at *1 n. l. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will almost always meet the connection test necessary for the application of maritime law. *Conner*, 799 F.Supp.2d at 467–69 (citing *Grubart*, 513 U.S. at 534). This is particularly true in cases in which the exposure has arisen as a result of work aboard Navy vessels, either by Navy personnel or shipyard workers. *See id.* But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. *Id.*

The alleged exposures pertinent to Defendant occurred aboard a ship. Therefore, these exposures were during sea-based work. *See Conner*, 799 F.Supp.2d 455; *Deuber*, 2011 WL 6415339, at *1 n. 1. Accordingly, maritime law is applicable to Plaintiff's claims against Defendant. *See id.* at 462– 63.

C. *Bare Metal Defense Under Maritime Law*

This Court has held that the so-called "bare metal defense" is recognized by maritime law, such that a manufacturer has no

liability for harms caused by—and no duty to warn about hazards associated with—a product it did not manufacture or distribute. *Conner v. Alfa Laval, Inc.*, 842 F.Supp.2d 791, 801 (E.D.Pa.2012) (Robreno, J.).

D. *Product Identification/Causation Under Maritime Law*

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." *Lindstrom v. A–C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir.2005); citing *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 375 (6th Cir.2001). This Court has also noted that, in light of its holding in *Conner*, 842 F.Supp.2d 791, there is also a requirement (implicit in the test set forth in *Lindstrom* and *Stark*) that a plaintiff show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. *Abbay v. Armstrong Int'l., Inc.*, No. 10–83248, 2012 WL 975837, at *1 n. 1 (E.D.Pa. Feb. 29, 2012) (Robreno, J.).

Substantial factor causation is determined with respect to each defendant separately. *Stark*, 21 F. App'x. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. *Id.* at 376 (quoting *Harbour v. Armstrong World Indus., Inc.*, No. 90–1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. *Lindstrom*, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." *Id.* Rather, the plaintiff must show " 'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.' " *Id.* (quoting *Harbour*, 1991 WL 65201, at *4). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827, 851 (3d Cir.1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as

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a matter of law a finding of strict products liability." *Stark*, 21 F. App'x at 376 (citing *Matthews v. Hyster Co., Inc.*, 854 F.2d 1166, 1168 (9th Cir.1988) (citing Restatement (Second) of Torts, § 402A (1965))).

III. Defendant Foster Wheeler's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Defendant contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused the illness at issue.

Bare Metal Defense

Defendant asserts that it has no duty to warn about and cannot be liable for injury arising from any product or component part that it did not manufacture or supply.

Government Contractor Defense

Defendant asserts the government contractor defense, arguing that it is immune from liability in this case because the Navy exercised discretion and approved the warnings supplied by Defendant for the products at issue, Defendant provided warnings that conformed to the Navy's approved warnings, and the Navy knew about asbestos and its hazards.

B. Plaintiff's Arguments

Product Identification / Causation / Bare Metal Defense

Plaintiff contends that he has identified sufficient product identification/causation evidence to survive summary judgment. In support of this assertion, Plaintiff cites to the following evidence, which Plaintiff represents is as follows:

- *Deposition of Plaintiff*

  Plaintiff testified that he worked aboard the *USS Turner* in the two engine and two fire rooms. He testified that there were two Foster Wheeler condensers aboard the ship and in the engine room. He testified that he was present when repair work was being done on these condensers, releasing dust from gaskets into the air. (Pl.Ex. A, Doc. No. 291.)

- *Various Pieces of Evidence*

  Plaintiff points to various documents and testimony, which indicates that (1) Foster Wheeler supplied its condensers with asbestos-containing gaskets, (2) Foster Wheeler supplied the ship with almost 1000 gaskets, for use as both original and replacement gaskets for the condensers, and (3) the condenser would have been using asbestos-containing replacement gaskets.

  (Pl. Exs. B – D, Doc. Nos. 291 and 291–1)

With respect to the so-called "bare metal defense," Plaintiff contends that, where a Defendant supplied a product with original asbestos-containing components parts (or accompanying external insulation), the burden is on Defendant to establish that all of this original asbestos was removed prior to Plaintiff's exposure to the product. According to Plaintiff, in the absence of such proof by Defendant, there is a fact question as to whether any of the original asbestos was still present at the time of his alleged exposure.

Government Contractor Defense

Plaintiff argues that summary judgment in favor of Defendant on grounds of the government contractor defense is not warranted because there are genuine issues of material fact regarding its availability to Defendant. Plaintiff cites to various military specifications, including, *inter alia*, MIL–M–15071, which, he argues, show that the Navy did not prohibit Defendant from providing warnings with its products and, instead, left the nature and provision of any such warnings for determination by Defendants.

C. Analysis

Plaintiff alleges that he was exposed to asbestos from gaskets in Foster Wheeler condensers. There is evidence that Plaintiff was exposed to respirable dust from gaskets in Foster Wheeler condensers. There is evidence that Foster Wheeler supplied its condensers with asbestos-containing gaskets. There is evidence that any replacement gaskets used in the condenser would have contained asbestos. There is also evidence that Foster Wheeler supplied almost 1,0000 gaskets for use on the ship with its turbines (as original and replacement parts). Importantly,

AND IT IS SO ORDERED.

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however, there is no evidence that the gaskets to which Plaintiff was exposed were manufactured or supplied by Foster Wheeler. This is because there is no evidence that the gaskets to which Plaintiff was exposed were the original gaskets provided with the condensers, or that they were replacement gaskets provided by Foster Wheeler (as opposed to replacement gaskets provided by some other entity). Moreover, Plaintiff implicitly concedes that he is not able to establish that he was exposed to original gaskets, and instead contends that the burden is on Defendants to establish that all original asbestos gaskets had been removed from the condensers prior to Plaintiff's exposures thereon. The Court has previously rejected this proposition, and has made clear that, under maritime law, the burden is on the Plaintiff to establish exposure to a product manufactured or supplied by Defendant. *See Conner*, 842 F.Supp.2d at 797.

In short, no reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from a product manufactured or supplied by Defendant such that it was a substantial factor in the development of his illness, because any such finding would be based on conjecture. *See Lindstrom*, 424 F.3d at 492. Accordingly, summary judgment in favor of Defendant is warranted. *Anderson*, 477 U.S. at 248–50.

In light of this determination, the Court need not reach Defendant's argument regarding the government contractor defense.

D. Conclusion

Summary judgment in favor of Defendant is granted with respect to all of Plaintiff's claims against it because Plaintiff has failed to identify sufficient evidence of product identification/causation.

APPENDIX I

United States District Court,
E.D. Pennsylvania.

John B. DEVRIES, et al., Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et al., Defendants.

MDL No. 875.

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E.D. PA Civil Action No. 5:13–00474–ER.

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Filed Oct. 3, 2014.

ORDER

EDUARDO C. ROBRENO, District Judge.

AND NOW, this **1st** day of **October, 2014**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendant Buffalo Pumps, Inc. (Doc. No. 274) is **GRANTED**.[1]

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[1] This case was removed in January of 2013 from the Court of Common Pleas of Philadelphia to the United States District Court for the Eastern District of Pennsylvania as part of MDL–875.

Plaintiff alleges that he was exposed to asbestos while serving in the U.S. Navy during the time period 1957 to 1960. Defendant Buffalo Pumps ("Buffalo" or "Buffalo Pumps") manufactured pumps used aboard ships. The alleged asbestos exposure pertinent to Defendant Buffalo occurred while Plaintiff was aboard the following ship:

- *USS Turner*

Plaintiff asserts that he developed an asbestos-related illness as a result of his exposure to Defendant's asbestos-containing products.

Plaintiff brought claims against various defendants. Defendant Buffalo has moved for summary judgment, arguing that (1) there is insufficient evidence to establish causation with respect to its product(s), and (2) it is entitled to summary judgment on grounds of the bare metal defense.

The parties assert that maritime law applies.

II. Legal Standard

A. *Summary Judgment Standard*

Summary judgment is appropriate if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a). "A motion for summary judgment will not be defeated by 'the mere existence' of some disputed facts, but will be denied when there is a genuine issue of material fact." *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 581 (3d Cir.2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

In undertaking this analysis, the court views the facts in the light most favorable to the non-moving party. "After making all reasonable inferences in the nonmoving party's favor, there is a genuine issue of material fact if a reasonable jury could find for the nonmoving party." *Pignataro v. Port Auth. of N.Y. & N.J.*, 593 F.3d 265, 268 (3d Cir.2010) (citing *Reliance Ins. Co. v.*

Moessner, 121 F.3d 895, 900 (3d Cir.1997)). While the moving party bears the initial burden of showing the absence of a genuine issue of material fact, meeting this obligation shifts the burden to the non-moving party who must "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

B. *The Applicable Law*

The parties assert that maritime law applies. Whether maritime law is applicable is a threshold dispute that is a question of federal law, *see* U.S. Const. Art. III, § 2; 28 U.S.C. § 1333(1), and is therefore governed by the law of the circuit in which this MDL court sits. *See Various Plaintiffs v. Various Defendants ("Oil Field Cases")*, 673 F.Supp.2d 358, 362 (E.D.Pa.2009) (Robreno, J.). This court has previously set forth guidance on this issue. *See Conner v. Alfa Laval, Inc.*, 799 F.Supp.2d 455 (E.D.Pa.2011) (Robreno, J.).

In order for maritime law to apply, a plaintiff's exposure underlying a products liability claim must meet both a locality test and a connection test. *Id. at* 463–66 (discussing *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S.Ct. 1043, 130 L.Ed.2d 1024 (1995)). The locality test requires that the tort occur on navigable waters or, for injuries suffered on land, that the injury be caused by a vessel on navigable waters. *Id.* In assessing whether work was on "navigable waters" (i.e., was sea-based) it is important to note that work performed aboard a ship that is docked at the shipyard is sea-based work, performed on navigable waters. *See Sisson v. Ruby*, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990). This Court has previously clarified that this includes work aboard a ship that is in "dry dock." *See Deuber v. Asbestos Corp. Ltd.*, No. 10–78931, 2011 WL 6415339, at *1 n. 1 (E.D.Pa. Dec. 2, 2011) (Robreno, J.) (applying maritime law to ship in "dry dock" for overhaul). By contrast, work performed in other areas of the shipyard or on a dock, (such as work performed at a machine shop in the shipyard, for example, as was the case with the Willis plaintiff discussed in *Conner*) is land-based work. The connection test requires that the incident could have " 'a potentially disruptive impact on maritime commerce,' " and that " 'the general character' of the 'activity giving rise to the incident'

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shows a 'substantial relationship to traditional maritime activity.' " *Grubart*, 513 U.S. at 534 (citing *Sisson*, 497 U.S. at 364, 365, and n. 2).

Locality Test

If a service member in the Navy performed some work at shipyards (on land) or docks (on land) as opposed to onboard a ship on navigable waters (which includes a ship docked at the shipyard, and includes those in "dry dock"), "the locality test is satisfied as long as some portion of the asbestos exposure occurred on a vessel on navigable waters." *Conner*, 799 F.Supp.2d at 466; *Deuber*, 2011 WL 6415339, at *1 n.l. If, however, the worker never sustained asbestos exposure onboard a vessel on navigable waters, then the locality test is not met and state law applies.

Connection Test

When a worker whose claims meet the locality test was primarily sea-based during the asbestos exposure, those claims will almost always meet the connection test necessary for the application of maritime law. *Conner*, 799 F.Supp.2d at 467–69 (citing *Grubart*, 513 U.S. at 534). This is particularly true in cases in which the exposure has arisen as a result of work aboard Navy vessels, either by Navy personnel or shipyard workers. *See id.* But if the worker's exposure was primarily land-based, then, even if the claims could meet the locality test, they do not meet the connection test and state law (rather than maritime law) applies. *Id.*

The alleged exposures pertinent to Defendant occurred aboard a ship. Therefore, these exposures were during sea-based work. *See Conner*, 799 F.Supp.2d 455; *Deuber*, 2011 WL 6415339, at *1 n. 1. Accordingly, maritime law is applicable to Plaintiff's claims against Defendant. *See id.* at 462–63.

C. *Bare Metal Defense Under Maritime Law*

This Court has held that the so-called "bare metal defense" is recognized by maritime law, such that a manufacturer has no liability for harms caused by-and no duty to warn about hazards associated with-a product it did not manufacture or distribute.

Conner v. Alfa Laval, Inc., 842 F.Supp.2d 791, 801 (E.D.Pa.2012) § Robreno, J.).

D. *Product Identification/Causation Under Maritime Law*

In order to establish causation for an asbestos claim under maritime law, a plaintiff must show, for each defendant, that "(1) he was exposed to the defendant's product, and (2) the product was a substantial factor in causing the injury he suffered." *Lindstrom v. A–C Prod. Liab. Trust*, 424 F.3d 488, 492 (6th Cir.2005); citing *Stark v. Armstrong World Indus., Inc.*, 21 F. App'x 371, 375 (6th Cir.2001). This Court has also noted that, in light of its holding in *Conner*, 842 F.Supp.2d 791, there is also a requirement (implicit in the test set forth in *Lindstrom* and *Stark*) that a plaintiff show that (3) the defendant manufactured or distributed the asbestos-containing product to which exposure is alleged. *Abbay v. Armstrong Int'l., Inc.*, No. 10–83248, 2012 WL 975837, at *1 n. 1 (E.D.Pa. Feb. 29, 2012) (Robreno, J.).

Substantial factor causation is determined with respect to each defendant separately. *Stark*, 21 F. App'x. at 375. In establishing causation, a plaintiff may rely upon direct evidence (such as testimony of the plaintiff or decedent who experienced the exposure, co-worker testimony, or eye-witness testimony) or circumstantial evidence that will support an inference that there was exposure to the defendant's product for some length of time. *Id.* at 376 (quoting *Harbour v. Armstrong World Indus., Inc.*, No. 90–1414, 1991 WL 65201, at *4 (6th Cir. April 25, 1991)).

A mere "minimal exposure" to a defendant's product is insufficient to establish causation. *Lindstrom*, 424 F.3d at 492. "Likewise, a mere showing that defendant's product was present somewhere at plaintiff's place of work is insufficient." *Id.* Rather, the plaintiff must show " 'a high enough level of exposure that an inference that the asbestos was a substantial factor in the injury is more than conjectural.' " *Id.* (quoting *Harbour*, 1991 WL 65201, at *4). The exposure must have been "actual" or "real", but the question of "substantiality" is one of degree normally best left to the fact-finder. *Redland Soccer Club, Inc. v. Dep't of Army of U.S.*, 55 F.3d 827, 851 (3d Cir.1995). "Total failure to show that the defect caused or contributed to the accident will foreclose as a matter of law a finding of strict products liability." *Stark*, 21 F. App'x at 376 (citing *Matthews v. Hyster Co., Inc.*, 854 F.2d 1166,

1168 (9th Cir.1988) (citing Restatement (Second) of Torts, § 402A (1965))).

III. Defendant Buffalo Pumps's Motion for Summary Judgment

A. Defendant's Arguments

Product Identification / Causation

Buffalo Pumps contends that Plaintiff's evidence is insufficient to establish that any product for which it is responsible caused the illness at issue.

Bare Metal Defense

Buffalo Pumps argues that it has no duty to warn about and cannot be liable for injury arising from any product or component part that it did not manufacture or supply.

B. Plaintiff's Arguments

Product Identification / Causation / Bare Metal Defense

Plaintiff contends that he has identified sufficient product identification/causation evidence to survive summary judgment. In support of this assertion, Plaintiff cites to the following evidence, which Plaintiff represents is as follows:

- *Deposition of Plaintiff*

  Plaintiff testified that he worked aboard the *USS Turner* in the two engine and two fire rooms. He testified that he worked around every pump in each of four rooms, while it was being repacked. He testified that he was exposed to respirable dust from packing and sometimes insulation on each of the pumps. He identified three main brands of pumps in those rooms: Warren, Buffalo, and DeLaval.

  (Pl.Ex.A, Doc. No. 298.)

- *Various Documents*

  Plaintiff points to various documents and testimony to establish the following: (1) Buffalo supplied numerous (at least 14) pumps for the ship at issue, (2) Buffalo supplied its pumps with asbestos-containing components (such as insulation, gaskets, and packing), and (3) Buffalo specified the use of such asbestos component parts with its pumps.

(Pl. Exs. B to D, Doc. Nos. 298 and 298–2)

- *Expert Affidavit of Arthur Faherty*

  In connection with its opposition to another pump manufacturer's motion for summary judgment, Plaintiff pointed to the affidavit of expert Arthur Faherty, who provides testimony that (1) "Generally, if a company supplied asbestos with its equipment, some of that asbestos was always present unless the record shows that the asbestos installed by the defendant was entirely, removed," and (2) "The removal of the entire initial asbestos never occurred."

  (Pl.Ex. E, Doc. No. 301–1 at ¶¶ 44–45)

- *Expert Affidavit of Capt. R. Bruce Woodruff*

  In connection with its opposition to another pump manufacturer's motion for summary judgment, Plaintiff pointed to the affidavit of expert Capt. Woodruff, who discusses the fact that assessment and overhaul of the *USS Turner* occurred in the period 1957 to 1960 and that a recommendation was made in 1957 to replace 75% of the lagging in the engineering spaces during an overhaul in 1960.

  (Pl.Ex. E, Doc. Nos. 301–1 and 301–2).

With respect to the so-called "bare metal defense," Plaintiff contends that, where a Defendant supplied a product with original asbestos-containing components parts (or accompanying external insulation), the burden is on Defendant to establish that all of this original asbestos was removed prior to Plaintiff's exposure to the product. According to Plaintiff, in the absence of such proof by Defendant, there is a fact question as to whether any of the original asbestos was still present at the time of his alleged exposure.

C. Analysis

Plaintiff alleges that he was exposed to asbestos from gaskets, packing and insulation used in connection with Buffalo pumps. There is evidence that numerous Buffalo pumps were aboard the ship on which Plaintiff worked. There is evidence that Buffalo supplied asbestos-containing component parts (such as gaskets,

packing, and insulation) with these pumps. There is evidence that, during the period 1957 to 1960, Plaintiff was exposed to respirable dust from packing (and perhaps gaskets) inside these pumps, and from external insulation on some of these pumps.

Importantly, however, there is no evidence that Plaintiff was exposed to respirable asbestos dust from gaskets, packing, or insulation supplied by Buffalo (either as an original part or a replacement part). Although Plaintiff points (in connection with his opposition to the motion for summary judgment of Warren Pumps, another pump manufacturer defendant in this action) to expert evidence to support his contention that some of the original asbestos material supplied by Buffalo was still present on the ship at the time of Plaintiff's alleged exposure, this evidence is nonetheless impermissibly speculative. Neither expert Faherty nor Captain Woodruff served aboard the ship at issue, and each concedes that at least some of the original asbestos material aboard the ship would have been removed prior to Plaintiff's alleged exposure. The evidence cited by Captain Woodruff that a recommendation was made in 1957 to replace 75% of the lagging on board certain areas of the ship in 1960 does not establish that the lagging had not been previously replaced and, in fact, suggests that at least 25% had already been replaced. Moreover, Plaintiff concedes that he is not able to establish that he was exposed to original asbestos, and instead contends that the burden is on Defendants to establish that all original asbestos (or replacement asbestos supplied by Defendant) had been removed from the ship prior to Plaintiff's exposures thereon. The Court has previously rejected this proposition, and has made clear that, under maritime law, the burden is on the Plaintiff to establish exposure to a product manufactured or supplied by Defendant. *See Conner*, 842 F.Supp.2d at 797.

In short, no reasonable jury could conclude from the evidence that Plaintiff was exposed to asbestos from a product manufactured or supplied by Buffalo such that it was a substantial factor in the development of his illness, because any such finding would be based on conjecture. *See Lindstrom*, 424 F.3d at 492. Accordingly, summary judgment in favor of Defendant is warranted. *Anderson*, 477 U.S. at 248–50.

AND IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 6746960

D. Conclusion

Summary judgment in favor of Defendant is granted with respect to all of Plaintiff's claims against it because Plaintiff has failed to identify sufficient evidence of product identification/causation.